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THE

CANADIAN LAW TIMES

EDITED BY

BRAM THOMPSON, M.A.

BARRISTER-AT-LAW.

VOLUME XLII.

1922

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The Canadian Law Times.

VOL. XLII. TORONTO, JANUARY, 1922. No. 1

EDITORIAL.

Business Combines.

The series of Articles promised last month we have been constrained to commence in this, the January issue of 1922; and we trust they will serve the purpose for which they are designed. That purpose is to ascertain whether and to what extent the Business Combination or Federation violates or impinges upon the Free Right of Contract.

We have been urged to commence the Articles by letters from Professional Men all over the Dominion; and we yielded though not quite satisfied that we were absolutely ready.

The first Article is no more than an Introduction to the subject; and in writing it we had the sensation of passing through almost inextricable bush and bramble, but encouragingly lured on by the light of the Lamp of Liberty to the spot where the Grand Highway of Constitutionalism begins in the 17th century. Along this, once found, the road was easy.

The subject requires careful thought and we shall be glad to receive as we go along, suggestions of a helpful character; or, after we have concluded, criticisms of every character.

The days of the Delphic Oracles are past; and we do not pretend to be the reincarnation of any of them. Therefore we are not dogmatists but earnest seekers after Truth; and Truth is a goddess who is only won by devotion.

All we will expect is that those who criticise us will evince some symbols of that same devotion which we ourselves have rendered at the Shrine of Truth.

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Rules of Court and Law—Statutory Rules.

Since the Article on "Making Law by Rules of Court" appeared in the CANADIAN LAW TIMES of last month, the contention has been advanced by several men more or less responsible for the Legislative error to which we directed attention, that the Rules of Court in Saskatchewan, and I suppose also those in Alberta, are Statutory Rules. The contention I find is without foundation.

The Rules of the Supreme Court of the North-West Territory were, I admit, Statutory Rules; and when the Province of Saskatchewan established its own Court in 1907, not only was the jurisdiction of the Supreme Court of the North-West Territory transferred to and conferred upon it, but the existent rules of the former Court were declared to "remain and be in force in the Supreme Court of Saskatchewan until they shall be altered or annulled by Rules of Court under this Act." By the Supreme Court Act, too, power was given to the new Supreme Court of the Province with the approval of the Lieutenant-Governor and with the concurrence of a majority of Judges, "to alter, amend, and repeal any rules of Court for the time being in force."

The Rules of the abolished Supreme Court of the North-West Territory were included in these two provisions, and they practically remained as they were, and as the Rules of the Provincial Supreme Court till 1912, when new Rules were promulgated which emphatically repealed and rescinded all previous Rules.

These new Rules were in no sense Statutory Rules. The Surrogate Court itself was created in 1907, and the Act establishing it gave to the Judges of the Supreme Court the same authority to make Rules for the Surrogate Court as they had to make rules for the Supreme Court. The Judges of the Supreme Court did make Rules for the Surrogate Court under this authority. They were included in the code of Rules promulgated in 1912. They were not Statutory Rules in any sense.

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All these new Rules of 1912 continued in force, with one or two amendments, till 1921, when a complete code of new Rules for the Court of Appeal, the Court of King's Bench and the Surrogate Court was promulgated. These Rules specifically rescinded all previous Rules. The new Rules themselves are made pursuant to the authority of the Acts under which the Court of Appeal, the King's Bench Court and the Surrogate Court now subsist; and clearly they are not Statutory Rules.

It was one of these Rules of 1921 (Rule 34 of the Surrogate Court) which was made to replace or to serve the purpose of Section 26 of the Trustee Act of 1903 reproduced as Section 27, ch. 46, of the Revised Statutes of Saskatchewan 1909, which was repealed by the Revised Statutes of 1920. This Section was therefore not in existence when Rule 34 was made; and Rule 34 therefore was an attempt to make substantive Law.

I may add that a Rule of Court to be Statutory must be either enacted by the Legislature itself, or after it has been made, it must be adopted, confirmed and put upon a Statutory basis by an enactment of the Legislature. Rules made pursuant to a Statutory authority can never have the effect of Statutory rules even if the Legislature in giving its authority should state that when made the authorized rules should be Statutory Rules, or have the force or effect of a Statutory enactment of them. The Legislature cannot delegate its legislative authority either to make Law or Rules of Court.

I am pleased to add that the error to which attention was directed was promptly redressed, as the Legislature chanced to be sitting when the January number appeared.

The K.C. Status—Judges' Salaries.

It is highly gratifying that some of the reformative proposals formulated in the CANADIAN LAW TIMES by the writer immediately after he assumed the Editorship two years ago have one after another met with

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acceptance and, to some extent, adjustment. One of these subjects was *Judges' Salaries,* and another was the status or degree of *King's Counsel.*

The Judges got an augmentation to their salaries but it was far from adequate; and worse than even the grudging spirit with which the increase was granted, the Government, yielding to its avaricious propensity, imposed, at the same time, on Judges' salaries an income tax from which previously they had been exempt. So that for all practical purposes what the Government doled out as a bounty with one hand, it took back with the other, in the spirit of the celebrated Isaac of York who paid his ransom by piling up usurious interest on former loans to his captors.

The question whether the tax is legal or not, I have more than once mooted. But if those who pay it are satisfied, why should I repine?

The reform of the system under which K.C.'s were appointed is well advanced, and very soon we will see this great dignity conferred upon Barristers nominated by Judges instead of by Politicians. Justice will then be done we have no doubt; and only men who have distinguished themselves in the Law will receive the status of a King's Counsel.

We started this movement early in 1920, and the Attorney-General of Ontario quickly followed it up by corresponding with Chief Justice Meredith and others. They were all practically unanimous; and Mr. Rainey sent copies of his correspondence all over the Dominion so that the other Provinces might act in co-operation. The effect was electrical; and we are delighted to know the achievement of the reform is imminent.

We have only, therefore, a word or two more to say.

If the conferring of the dignity of K.C. in any Province is dependent in any way upon the years of a man's standing at the Bar, the reckoning should include the years spent in practice in any other Province of Canada or in England, Ireland or Scotland. If this is not done there will be injustice. Many of Canada's lawyers had their first standing in the Mother

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Country; and when they come here and distinguish themselves as jurists or advocates, they should not be deprived of the honour to which they are, on their merit, entitled, or subordinated or postponed to other men, merely because they have not the prescribed period of standing at the Bar of any particular Province. If they have the years of standing at any Bar it ought to suffice.

But I would suggest that the Judges who are entrusted with the right of nomination should not be restricted by considerations of time at all. Some men never improve or develop; and some lawyers of 20 years' standing are just where they began so far as legal knowledge and ability are concerned. Other men develop rapidly, and achieve in five years what others could not reach in a lifetime. Time, in truth, is no test; and it should not, alone, be regarded as a qualification. At all events the nominating Judges should be untrammelled by it; and certainly they should not be obliged to nominate any one merely because he has a prescribed numbers of years' standing at the Bar.

One word more. The dignity should carry with it a certain code of etiquette or ethics. The K.C. should abandon and leave to others certain arenas or spheres of work. He should, for instance, not appear in Chambers except when he has a Junior with him. This circumstance will itself show the importance of the matter which renders his appearance a necessity.

Parliamentary Divorce.

A letter to the Editor by Mr. R. V. Sinclair, K.C., of Ottawa, on the subject of Parliamentary Divorce, was published in the August-September issue of 1921; and we certainly expected some lively correspondence on the views enunciated by Mr. Sinclair, both from those who oppose and those who support the contention which we have advanced that Parliamentary Divorce, as carried out in Canada, is illegal.

When Mr. Sinclair's letter was written the regular publication of the CANADIAN LAW TIMES was inter-

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rupted by a Printers' Strike. But when it appeared we promised to abstain for two months or so from giving any reply to it so as to give an opportunity to every Lawyer in Canada to express his views on the great social and legal problem—whether the Parliament of Canada has really been divorcing people legally, or has only been humbugging them into a belief in the reality of the ceremonial which it knew to be a farce.

An issue such as we have raised cannot—should not in the interest of our social life—be shirked or evaded. It touches especially the heart of Ontario, which is the greatest patron of Parliamentary Divorce in Canada. Last Session it had something like 350 Divorce Petitions before Parliament. Does Ontario not care whether Parliamentary Divorce is a reality or a farce? If so, her people of the present day have dwindled in moral attributes far below those who reared her eminence in the last generation or two. There are men of eminence in the Law who agree with the views we have advanced that Parliamentary Divorce is illegal. As a general rule the Ontario Lawyer must believe in it, or else long since he would have seen that the farce—the scandal I should say—was terminated. Whether he had views one way or other, the subject was momentous and vital enough to evoke —nay to compel—an expression of opinion. That it is without any element of legality I have avowed over and over again. See C. L. T., Vol. 39, page 253; Vol. 40, pages 77, 258, 337, 447, 547, 785, and Vol. 41, pages 255, 550, 647.

If I am wrong I would only be too glad to have my distorted views rectified by a candid refutal of all I have written. But it is because I fervently believe in the accuracy of my opinion, and because I am quite as fervently interested in the purity of Canada's Law as in the purity of her morals and social life, that I persist in bringing forward this subject when those most interested switch it into the background and reckless of right or wrong go ahead with getting Divorces by the Parliament of Canada.

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What a scandal or infamy it will be some day if we are awakened by a decision of the Privy Council that Parliamentary Divorce is, and always has been, illegal! How abject we will look in asking the Imperial Parliament to legalize all the past Divorce Acts of the Parliament of Canada, and to legitimize the offspring of second marriages made in reliance on the validity of such divorces!

I have since 1919 constantly urged in the CANADIAN LAW TIMES the need for a Dominion-wide Divorce Act. Twice or three times the Government essayed the task of proposing such a measure. The efforts were always still-born. They were, in fact, abortions completely; and after I had revealed their sorrowful plight, they passed to oblivion.

We have a new Government. Whether it will make an attempt to enact a Divorce Law remains to be seen. But if it does not do so voluntarily Ontario at all events should urge the absolute necessity of providing a redress or remedy for the anomalous position which it occupies. Till I made clear in 1917 the fact that the Western Provinces of Manitoba, Saskatchewan, and Alberta had the English Law of Divorce, and had it for nearly 40 years, they stood in the same predicament as Ontario. But when my contention was sustained by the Privy Council in 1919 they left Ontario alone; and now they are intent only in reforming and improving the system which they possess.

Next month, having by that time got all the comments which we expect on Mr. Sinclair's letter, we propose to give an answer to the very interesting questions raised by it.

Lawyers' Fees—Law Society Work.

Another hoist has been given to the Schedule of Fees in England. This time it is an increase of 50 per cent. During the War period there was another increase of 33⅓ per cent. This looks like meeting the situation and doing some measure of justice to the

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practitioners in the Law. How it compares with the niggard hand of those who fix the Lawyers' fees in the various Provinces of Canada!

The fees in the Old Country, in England as well as in Ireland and Scotland, were always higher than in this Country. Considering the purchasing power they stood in something like the relationship of a pound or sovereign to a dollar. We get in Canada a couple of dollars for work that brings in a couple of pounds in any part of the United Kingdom. Of course there are cheap proceedings for small debts just as there are here, but they are in every sense summary proceedings, and the parties if they have any controversy have to meet the Judge and air their contentions before him face to face. The Small Debt System in this Country presents all sorts of possibilities for prevarication, evasion and delay. The Fees are—well each Lawyer can find his own adjective to describe what he thinks. It is high time however that this question of Fees was taken up broadly.

The Law Societies are so generally controlled by men who have passed the trying stages of life, and are in comfortable circumstances, not very often so much by the successful exercise of their Profession as by pursuing the accessory opportunities which it had presented to them,—that they turn aside from any proposal to raise the fees beyond what they were accustomed to in their early days when a dollar had a greater buying capacity than five or seven dollars have to-day.

The Law Society ought to be a potent factor in Canada not only with regard to the rights of the Professional man, but with regard to infinitudes of necessary things for the public weal. These they never touch, and what is more they never encourage one of their number to touch them.

At all events the Law Societies have done nothing to curb the ravages of the interlopers in the Law — a gross scandal and injustice which I have over and

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over again exposed. The men who control the Law Societies have acquired fortified practices from which the interloper is excluded, so he is left free to ravage at will the fields of the young Practitioner who has passed his examinations and paid his fees for a legal preserve which he finds infested with *canaille* of every kind.

B. T.

HASTINGS LAW ASSOCIATION ANNUAL MEETING.

The annual meeting of the Hastings Law Association, held January 10th in the library at the Court House, was largely attended by both members of the Bench and Bar. The Treasurer's and Librarian's reports were received and satisfactory to the members. The Association discussed many matters relating to the legal profession, after which the following officers were elected for the year 1922:—

Honorary President, W. Carnew, K.C.; President, Major R. D. Ponton; Vice-President, W. C. Mikel, K.C.; Treasurer, M. Wright; Secretary, C. A. Cameron; Curator, A. B. Collins.

Trustees—Colonel W. N. Ponton, K.C., E. Guss Porter, K.C., M.P., E. J. Butler, His Honour Judge Wills, His Honour Judge Deroche, Col. S. S. Labier, E. B. Fraleck, S. Masson, K.C., F. E. O'Flynn. Auditors, B. Donnan and F. G. Cushing. Librarian, Miss McRae.

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INTERNATIONAL TREATIES IN RELATION TO LEGISLATIVE POWER.

By The Honourable Mr. Justice J. D. Cameron, Manitoba.

Treaties are contracts between nations and are, in practice, usually agreed to by plenipotentiaries or agents invested with full powers and, when reduced to writing and signed and sealed, become binding, though subsequent ratification by the sovereign power is usual. The authority in whom the treaty-making power is vested varies according to the constitutional law of the particular state. In Great Britain the sovereign power is vested in the Crown and treaties are in general binding on the subject without parliamentary sanction. Nevertheless the consent of the Parliament, either previously given or by subsequent ratification, is necessary in certain cases, though there is no codified list of subjects as to which parliamentary sanction is not essential. It has been the practice, however, to obtain statutory authority beforehand or to provide in the treaty that such authority shall be obtained.

In the case of treaties relating to peace and war, cession of territory, or alliance with foreign powers, they have been generally considered binding without parliamentary consent, but it has been thought wise to obtain such authority. Statutory authority was sought and obtained for the cession of Heligoland in 1890.

It is said in Halsbury on the Laws of England, in the article on Constitutional Law, from which the foregoing observations have been taken, that where "taxation is imposed, or a grant from the public funds rendered necessary, or where the private laws of trade and navigation are affected, or where the private rights of the subject are interfered with by a treaty concluded in time of peace, it is apprehended that the

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previous or subsequent consent of Parliament is in all cases required to render the treaty binding upon the subject and enforceable by officers of the Crown. But where the treaty is made to put an end to war, or, possibly, to prevent war, on public grounds and for the public safety, it is doubtful whether the sanction of Parliament would be always required. In all cases, however, the courts are competent to inquire into matters involving the construction of treaties and other acts of State; and the plea of an act of State, or that the matter involves the construction of treaties, affords no valid defence to an action against officers of the Crown for interference with the private rights of a British subject."

The authority for the last mentioned statement is to be found in *Walker* v. *Baird,* 1892, A. C. 491. In that case the defendant, Captain of H.M.S. Emerald, had entered and seized the plaintiff's lobster factory on the coast of Newfoundland pursuant to the terms of a *modus vivendi* entered into by Her Majesty the Queen and the Republic of France, and defended his action as an act of State performed under the provisions thereof. The Newfoundland court held this was no answer. The Privy Council confirmed its decision to holding that the Court below was right in holding that the allegations of the defence did not bring the case within the limits contended for by the appellant, viz., that the Crown has the power to enforce the obedience of its subjects to the provisions of a treaty having for its object the preservation of peace and that an agreement which was arrived at to avert a war which was imminent was akin to a treaty of peace and subject to the same constitutional provisions. The Privy Council did not give any decision as to the powers of the Crown in such cases. The argument of Sir Richard Webster, and the questions asked by the members of the Committee, make instructive reading.

"Anson terms this judgment an evasion; but it must be taken to affirm that the treaty in question was

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not a treaty of peace nor akin thereto as intended to avert imminent war, in which cases alone the question would be arguable." Clement, Canadian Constitution, p. 140.

In the United States the treaty-making power is vested in the President, acting by and with the consent of the Senate. Sub-sec. 2 of sec. 2 of Article II of the Constitution, adopted in 1787, provides:

> "He (the President) shall have power, by and with the consent of the Senate, to make treaties, provided two-thirds of the senators present concur."

The Treaty of Versailles, though signed by President Wilson, representing the United States, nevertheless failed to secure the consent of the required majority of the Senate, and, consequently, never came into effect so far as the United States is concerned.

Article VI, sec. 2, of the Constitution, contains this important provision:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

It will be observed that the Constitution provides that that instrument and the laws and treaties of the United States shall be the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding. Thus treaties are expressly made paramount to both the laws and the constitutions of the several States, "and while there is no express provision in the Constitution as to the effect of conflicts between treaties and Acts of Congress, they are placed by that instrument upon the same footing, each being declared to be the supreme

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law of the land, so that neither has any inherent superiority over the other. Either may supersede the other and in case of conflict the one which is later in date will control." This citation is from an article on Treaties by Mr. Justice Day of the Supreme Court of the United States in 38 Cyc, p. 975. There can, therefore, be no question of the stark power of Congress to amend or abrogate the provisions of a treaty with a foreign power. Where, however, the laws or constitution of a state are in conflict with a treaty the latter will prevail. This rule has been frequently applied to state statutes referring to the property rights and disabilities of aliens.

Section 132 of the British North America Act provides:

> "The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries."

There are two peculiarities in the language of this section to which attention may be called, and there may be some history behind them. The word "Government" is not used elsewhere in the Act in the sense in which it is in this section. There is the term "executive government" used in the 9th section, and the word "Government" may be taken as equivalent to Privy Council. The term "British Empire" is not apparently used elsewhere in the British North America Act. It is possible that it is used in other Acts. It is to be noted that in the Treaty of Versailles it is the British Empire that is the contracting party.

In Clement on the Canadian Constitution it is pointed out that there is in this section an inference that Imperial treaties may impose obligations on Canada and its provinces, but the section itself imposes none and nothing is said as to what will

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happen if Parliament and the Government fail to recognize and enforce them.

It can be stated also that an inference may be drawn from the section that in respect of Imperial treaties affecting Canada and the provinces ratification by Parliament and the Government is, or may be, necessary to give them effect and that this section is notice to the world of that constitutional provision. Whether such ratification is all that is necessary in matters where there is a conflict between federal and provincial jurisdiction is a matter to which reference will be made later.

In regard to this section Mr. Justice Clement discusses the question of the treaty-making power of the Crown operating to affect private rights to persons and property. He holds it clearly established that a treaty made in time of peace does not of itself without statutory authority alter the law either as regards individual rights in property, rights of action or as to personal liberty. He refers to the decision of Sir R. Phillimore in The Parlement Belge, 48 L. J. P. 18, which arose under a convention between Her Britannic Majesty and the King of the Belgians, to two subsequent decisions arising under the International Convention for the Protection of Industrial Property signed at Paris in 1883, and to the case of *Walker* v. *Baird,* above referred to. As to personal liberty he points out that it has never been seriously questioned that extradition treaties must be supplemented by legislative enactment to be enforceable.

Mr. Justice Clement further holds that it is clear that the Crown in Council (Imperial) cannot by treaty impose any restriction upon legislative power conferred on a colony by Imperial Acts. But if an Imperial treaty extends in its terms to a colony and is authorized or ratified by an Imperial Act it is in effect an Imperial Act and does impose such limitation. Such was also the view of Mr. Lefroy (Legislative Power in Canada, p. 258), though there have been judicial decisions in British Columbia holding provincial Acts

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respecting Chinese taxation invalid as conflicting with treaties between Great Britain and China. Notwithstanding these decisions Mr. Lefroy was of opinion that if a colonial law is *ultra vires* on this ground it can be only for the reason that it is extra-territorial in its effect and does not concern merely local matters.

The history of the British Columbia legislation restricting the immigration of Chinese, the subsequent litigation respecting the same and the enactment of the Dominion legislation of 1885 is to be found in Todd, Parliamentary Government in the Colonies, 2nd ed., p. 194, *et seq.*

The subject is dealt with by Dr. Keith in his work on Responsible Government in the Colonies, vol. III., p. 1101. He lays it down that "the mere making of a treaty is inadequate to create any new legal rights or duties under municipal law," and regards the case of *Baird* v. *Walker* as having, for all practical purposes, decided the matter. The correct procedure, he says, is for every colony which accepts a treaty to pass the necessary legislation to give it force. Some interesting and instructive correspondence on the relation of the Imperial and Colonial Governments with regard to the interpretation and enforcement of treaties is given in this work.

It is clear that during the war and the negotiations of the Peace Conference at Paris leading up to the Treaty of Versailles and on the execution and ratification of that Treaty the status of the overseas Dominions in relation to the Empire and to foreign nations became strengthened and changed. There is no need to dwell here upon that aspect of our constitutional development. It is in fact a stage in an evolutionary process, which was quickened by the tremendous events of the war and the extent of which it now would be difficult clearly to estimate.

The Treaty of Versailles having been ratified by Imperial legislation and by an Act of the Parliament of Canada, no question can arise as to its validity as an exercise of the treaty-making powers of the Crown

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alone. Discussion has, however, arisen as to whether the Dominion Parliament alone can carry out its provisions or whether such required legislation as is within the provincial sphere must not be passed by the provincial legislatures to acquire validity. The question was debated in the Canadian House of Commons in the session of 1920 with reference to the provisions of the Treaty respecting Labour to be found in Part XIII. These provisions constitute a permanent organization under the League of Nations to consist of a General Conference of Representatives of its members, to meet once a year and to consist of four representatives of each member, two to be government delegates and two others to be representatives of employers and workpeople of each member. When the Conference has decided on the adoption of a proposal it is to do so in the form: (*a*) of a recommendation to be submitted to the members for consideration with a view to effect being given by it to national legislation or otherwise, or (*b*) of a draft international convention for ratification by the members. A majority of two-thirds of the votes cast by the delegates shall be necessary on the final vote. Each of the members undertakes that it will, within the period of one year at most from the closing of the Conference or, in any event, not later than eighteen months thereafter, submit the draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action. If no legislative action be taken on such convention no further obligation is to rest upon the member.

> "In the case of a federal state, the power of which to enter into conventions on labour matters is subject to limitations, it shall be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this Article with respect to recommendations shall apply in such case.
>
> "The above Article shall be interpreted in accordance with the following principle:

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"In no case shall any member be asked or required, as a result of the adoption of any recommendation or draft convention by the Conference, to lessen the protection afforded by its existing legislation to the workers concerned."

Section 132 of the British North America Act is certainly open to the construction that the Dominion Parliament and Government are given the power and authority to implement Imperial treaties by legislation and otherwise without regard to the division of powers between the federal and provincial legislatures prescribed by sections 91 and 92. On the other hand, it can be argued that section 132 is to be read with and not as overriding the previous sections of the Act and that it was not thereby intended to depart from the vital constitutional distinctions of the federal system. From the one point of view the enactment of legislation ratifying a convention of the Conference respecting the eight-hour day, for instance, would be wholly with the Dominion Parliament. From the other it might lie with the provincial legislatures.

It is to be borne in mind that the Treaty of Versailles has been ratified by an Act of the Imperial Parliament and its effect upon the British North America Act must be considered. The Treaty, as so enacted, recognizes the limitations of a federal state and the necessity of obtaining the consent to labour conventions of the consent of the authority or authorities within whose competence the matter lies. Whether the effect is to leave the provincial powers unimpaired or to give the federal parliament and government full jurisdiction is a matter for discussion and perhaps for ultimate determination by the Courts.

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ARE BUSINESS COMBINATIONS LEGAL?

Dominion v. *Provincial Authority.*

By Bram Thompson, M.A., Barrister-at-Law.

Introduction.

In this day and generation of Combines and Organizations which curb our freedom and coerce us into submission, it is incumbent upon us to make a re-survey of the ramparts built around us at the time when the *demos* or people finally overwhelmed the *autokrateia* of absolute Sovereignty with its adherents and militant upholders through all the grades downward from Duke to Squire which Feudalism imported into the English system of Government with the victorious invasion of the Norman Chivalry.

Such a survey is necessarily a work of each man for himself. I do not intend to write Constitutional History; but this I will say that autocracy was doomed by the passing into Law of the famous Bill of Rights. Then the House of Commons became the recognized Champion of the People; and for many years after that, the people were steadily advancing their standard into the arena from which the invader or usurper of their liberties was being expelled. One by one the vestiges of the odious regime of tyranny were being removed, while Parliament was augmenting its strength by adapting itself to the new conditions and needs of the people which the progress of the World was constantly unfolding or evolving. The Suffrage of the Householder was conceded in the reign of Queen Victoria. It soon was made universal; and Universal Suffrage was thought to be at once the Crown and Glory of the People of the British Empire wherever on the globe their lot was cast, and however divergently they might develop their several Nationalities within the Great Constellation.

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Universal Suffrage was represented as the panacea of all our woe; the antidote for tyranny of every kind and degree; and the Seal of the complete emancipation of the individual man. So it would have been if we had cherished the heritage transmitted by our valiant Sires. But what a contradiction and reversal of all this panorama is the spectacle we to-day behold?

The old Tyranny has been replaced by a new; and the new is more odious by far than that which preceded it.

We are in bondage more servile than ever before. The freedom of the individual man exists no more. He has sunk, submerged, and lost himself in the mazes of one organization after another. Political organizations talk in Parliament and influence its proceedings for the aggrandisement of themselves and their coteries or members, but to the detriment or impairment of the rights and welfare of the community at large—the people of the Country. "Sovereign people" they are glibly called on the hustings when the minion of some political organization tries to cajole them into voting for what he himself prattles off as a parrot does its phrases. Sovereign people they are in theory, and Sovereign people they would be in fact if they had exercised their Sovereignty and had not surrendered it.

The Sovereignty of this Country for all the practical purposes of daily life is in the Autocratic Combination with its multiform ramifications all tending to the same end—the imposition of a yoke upon the individual, and the plunder of the public.

Worst of all, it was the newly enfranchised—the just emancipated—people themselves who, ceasing to be vigilant, became apathetic, and allowed this new Tyranny to be imposed upon them.

Whether the political organization is the first generator or not, it is certainly one of the tyrannous combinations which encircle us with ever extending orbit ever since the day when the individual man, after first rising high in the empyrean as a rebound from the thraldom of autocracy, suddenly dropped from his alti-

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tude into the abysmal depths of nonentity: and circle after circle of Combinations has since radiated round the spot of his submergence. From the organization-abyss, the individual man never more rose; and he still flounders in its inscrutable oblivion.

Trade Unions first came in by slyly suggesting that they were merely rectifying agencies for the wrongs of workmen. But quickly they passed to asserting Rights —contractual rights as to wages with a general strike for their sanction—which Parliament has to a considerable extent acknowledged. I do not propose to discuss them here or the licenses which Parliament has yielded them, except in so far as it may be necessary to discuss the general proposition: How far any combination has a right to impose its will upon either the individual man or the public at large.

It was doubtless the success of the Trade Unions and the comparative immunity of their members from many of the restraints of the Law which brought into operation Business Combinations. These to-day are the bane of our existence. For some years they had been feebly forming themselves in perspective. But with the advent of the War they consolidated and emerged strong as bands of steel to assert their dominance over us. During the War period they were ruthless. They created an artificial famine in one article and inflated prices to famine pitch in another. Parliament silently watched the operation. The cry of the people was not heard; because the creak of the political machine or organization stifles every other sound within the walls of Parliament. It was one organization watching the effort for success of another; and hence the sympathetic apathy of Parliament.

The commodities of life were first subjected to the Business Combines; and no sooner had they achieved success in fixing irrational and artificial prices in that sphere than they extended their scope and proceeded to fix prices on a corresponding basis for every other species of commodity. To-day everything from an apple to an automobile is controlled by them; and

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hence we have combines of Importers, Manufacturers, Brokers, Wholesalers and Retailers of every article known and needed by the people of the Country. Not only do they fix prices at their own sweet will among themselves, but they control the price at which every commodity is eventually sold to the consumer.

Famine prices still prevail all over this Country, though we have neither war, pestilence nor famine, but only insatiable lust and greed of gain running wildly around and exacting the extortions of Business Combines.

The success of these Business Combines means the undoing of the people, their spoliation, and their enthralment.

It is not Parliament, or the people, but the Business Combine in one sphere or shape or another that dominates this Country; and it is to expound its legal position, to test its legality, and to devise a remedy or redress for its iniquity that these Articles are designed.

The most sacred of the rights of every Freeman, next to the right of his individual liberty, is the Right of Free Contract. It is an inherent right. It cannot be baffled, bartered or sold. Can it be taken away?

There are things which even Parliament can not touch or impair —the fundamentals of our Constitutional Rights and Liberties. These were laid before Parliament, as we know it, evolved. The Revolution gave to Parliament its first vesture of democracy with a mandate to safeguard these Rights and Liberties; and assuredly Parliament cannot destroy them without another specific mandate of the people themselves. Impotent to directly destroy these Rights and Liberties, can Parliament by its failure to enact or to enforce adequate Law as a rampart around them, connive at their annihilation or destruction by mercenary marauders in the guise of Business Combinations or Confederacies?

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LEGISLATIVE POWER.

The Legislative authority of the Imperial Parliament is represented in Canada (1) by the Dominion Parliament, and (2) by the Legislature of each Province. The conjoint authority of the two approximates very closely to the authority of the House of Commons in the Mother Country. Between them, without a doubt, they possess the power to safeguard our lives and liberties, and those rights and privileges of freemen so valiantly fought for and won by our progenitors when England, Ireland and Scotland were merely Island Nations, long before Britain's name was even linked with the idea of Empire, and at a period when the North American Colonies were but a few straggling and struggling settlements.

Among those Rights and Liberties is the Right of Free Contract—the right of each individual to buy and to sell where and at whatever price he listeth, undeterred by menace, and neither controlled nor coerced by conditions other than natural conditions.

One of the great Jurists who decided the famous case of *Quinn* v. *Leathem* — the Master of the Rolls in Ireland—stated this:—"I can conceive of no civilization, properly so called, in which it would be consistent with the Law for a number of persons to band themselves together without any legitimate personal interest and for sinister objects only to deprive other citizens of the means of living and carrying on their lawful trades and business in peace. If there be any such civilized country it would not be a desirable one to live in. If it be the Law that all under its sanction have a right to exercise their lawful callings under its protection, it seems to follow that an organized plan to deprive them of that right must be illegal and a wrong."

And Baron Alderson in another famous case said: "It is the privilege of a Trader in a free country in all matters not contrary to law to regulate his own mode of carrying it on according to his own discretion and choice."

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I shall have occasion to quote these cases in detail before I have concluded; and then I shall give proper references to them. For the present I use them for this introductory part of my Articles to show that the Right of Free Trading "according to his own discretion and choice" is the right of every man engaged in trade, just as the right of making a Free Contract "according to his own discretion and choice" is the right of every buyer from, or customer or patron of, the Trader.

No such right as is mentioned above exists or is exercisable in Canada to-day, owing to artificial conditions created, and to consequent coercion invented, by Business Combines.

So far the Provincial Legislatures have done nothing to control or curb the Business Combines, though they are invested with authority over "Property and Civil Rights" and over "generally all matters of a merely local or private naure in the Province."

It is under these very powers that the Provincial Legislatures have passed their Temperance Laws, as they are called, and despoiled the citizen of his right to drink a glass of beer if he wishes to do so. If this is a reform, it certainly has an odious outgrowth of even worse evils than it has removed. But that, here at all events, does not concern me.

Hitherto the Provincial Legislatures have shirked their duty in regard to the blatant evils of Business Combines, or found a pretext for not performing it, by pleading that "the regulation of Trade and Commerce" is reposed in the Dominion Parliament. The same argument, if it is valid, was equally good for non-intervention in the control of the liquor traffic which is as much a matter of "trade and commerce" as are dealings in the commodities required for the home, or in the implements of any trade and industry carried on within the Province. Yet the Province exerted its power with one evil by controlling the sale of liquor, though it has left absolutely untouched the ten-fold greater evil of the Business Combines which defy and deny the Civil Right of a man to buy, as well as that of the vendor of a commodity to sell, at whatever price

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he listeth; and they compel the buyer to pay, as well as the retailer to exact from the consumer, an extortionate price—a price fixed by caprice, and not a price ascertained or fixed by competition, or by the laws of supply and demand, or fixed even relatively to the cost of producing the commodity.

The Dominion Parliament has in its Criminal Code some sections about "Conspiracy in Restraint of Trade" upon which it will be my duty to animadvert before I have completed this series of Articles. For the present I content myself with saying that the Criminal Code, in this respect, is antiquated. The Business Combine has emerged long since 1906 and there are no adequate provisions dealing with its illegalities. It is, in its operations, a new species of crime; or rather it is an old handiwork of craft and villainy equipped with the newest machinery of inventive genius. Fortunately, of course, as we shall see, we have the Common Law — that exhaustless resource whenever our Civil Rights and Individual Freedom require either to be expounded or vindicated.

The Provincial Legislatures have however no longer any excuse for inactivity.

The Provincial Legislature is far more emphatically than the Dominion Parliament, the guardian of our Civil Rights; and two recent cases before the Privy Council, namely, *Canadian Pacific Wine Company* v. *Tuley et al.*, 37 T. L. R. 944, and *Attorney-General of Canada* v. *Attorney-General of Alberta*, 38 T. L. R. 90, have placed in its hands two weapons which are not only indispensable to its activity, but they clearly put the obligation upon it to act promptly in controlling the operation of these Business Combines which are constantly and persistently invading, impairing, subverting, and circumventing our Civil Right of Free Contract—freedom of sale and freedom of purchase, at prices fixed by competition, and by the laws of supply and demand.

The meaning of the first case is that the Provincial Legislature has a large element of control over criminal or quasi-criminal matters in the Province which are

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not covered or touched by the Criminal Code. It reaffirmed the authority of the Province to enact Prohibitory Laws in regard to liquor, but it determined for the first time that the administration—the enforcement—of those laws is also reposed in the Province. It has precisely the same authority and power in reference to any other infraction of our Civil Rights.

In the second case it was decided that the Combines and Fair Prices Act 1919, and the Act of the same year appointing a Board of Commerce to administer it, were both *ultra vires* of the Dominion Parliament as invasions of the authority of the Province over "Property and Civil Rights." Neither dealing in liquor nor the fixing or controlling of prices for any article of trade or commerce in the Province, can henceforth be regarded as within the sphere of the Parliament of Canada. Both of them are within the competence of the Provincial Legislature; and it can enact its own Laws regarding them and enforce those Laws by "penalty, fine or imprisonment."

It is a transcendent new revelation; but a revelation involving an onus of duty which the Government or Legislature of the Province cannot longer shirk or evade.

The Business Combine so far as it operates within the Province in carrying out any of its schemes of fixing prices, be they fair or be they unfair, of controlling the supply of any commodities, or of monopolizing them, or of rendering them procurable at anything but prohibitory prices, or at any prices other than those fixed by the economic laws of supply and demand, and the free sale and exchange of the mart, market, shop and store—is from this day forth under the authority of the Legislature of the Province.

There can be no more "passing the buck" from the Dominion to the Province while the public are the prey of the ravening wolves of Business Combines.

This right of Free Contract itself and the crime of impairing or invading it, will be discussed in next month's issue.

(To be continued in February Number.)

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PROPOSED AMENDMENTS OF THE BILLS OF EXCHANGE ACT.

By John D. Falconbridge, M.A., LL.B., K.C.

When the Bills of Exchange Act, as enacted by the British Parliament in 1882, was adopted in Canada in 1890, there was no Dominion Bankruptcy Act. Accordingly, various provisions of the original Bills of Exchange Act which related to bankruptcy were omitted from the Canadian Act. As there is now a Bankruptcy Act in force in Canada, it seems desirable that the Canadian Bills of Exchange Act should be amended by the addition of the omitted provisions.

If the Bills of Exchange Act is to come before Parliament for this purpose, the occasion might also be used to improve the statute in some other respects.

The various suggested amendments are classified for convenience of discussion.

I. Bankruptcy.

The Bills of Exchange Act should be amended in the following respects so as to make it conform with the original statute.

Section 2, sub-sec. 1 (Definitions). Add the following definition after clause (c):

> (cc) "bankrupt" includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy.

(Bills of Exchange Act, 1882, s. 2).

Section 78 (Presentment for acceptance). Add the following clause:

> (e) Where the drawee is bankrupt, presentment may be made to him or to his trustee.

(Bills of Exchange Act, 1882, s. 41).

Section 79 (Presentment for acceptance dispensed with). Amend clause (a) to read as follows:

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(a) Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill.

(Bills of Exchange Act, 1882, s. 41).

Section 97 (Notice of dishonour). Add the following clause:

(e) Where the drawer or endorser is bankrupt, either to the party himself or to the trustee.

(Bills of Exchange Act, 1882, s. 49).

See Debates, House of Commons, 1890, vol. 1, col. 349, from which it is clear that the sole reason for omitting these provisions was the lack of a Bankruptcy Act in Canada.

II. Presentment for Payment.

The Canadian Bills of Exchange Act, s. 87, sub-s. 1, is as follows, with the exception of the words in brackets:

87. Presentment must be made by the holder or by some person authorized to receive payment on his behalf [at a reasonable hour on a business day], at the proper place as hereinafter defined, and either to the person designated by the bill as payer or to his representative or some person authorized to pay or to refuse payment on his behalf, if, with the exercise of reasonable diligence, such person can there be found.

The words "at a reasonable hour on a business day" are contained in the corresponding section of the original statute—the Bills of Exchange Act, 1882, s. 45—but were omitted from the Canadian statute. It is submitted that the words should be inserted in s. 87. They have been retained in s. 78, relating to presentment for acceptance. The words "his representative or" do not occur in the original statute, but seem to be harmless.

The Canadian Bills of Exchange Act, s. 183, is as follows:

183. (1) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place.

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(2) In such case the maker is not discharged by the omission to present the note for payment on the day that it matures; but if any suit or action is instituted thereon against him before presentation, the costs thereof shall be in the discretion of the court.

(3) If no place of payment is specified in the body of the note, presentment for payment is not necessary in order to render the maker liable.

The corresponding section in the original statute—the Bills of Exchange Act, 1882, s. 87—is as follows:

87. (1) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable.

Under the original section it appears to be settled law in the United Kingdom that presentment at the place named before action is essential, although the maker is not discharged by any delay in such presentment short of the period fixed by the statute of limitations, but in the case of a note payable generally no presentment for payment is necessary to change the maker.

Under the Canadian section, there is one line of cases in favour of a construction similar to that given to the original statute. The result, in the case of a note payable at a particular place, is that if the plaintiff fails to prove presentment at that place before action, the action against the maker must be dismissed, but under sub-s. 2 the court may in its discretion deprive the successful defendant of the costs of the action.

See *Croft* v. *Hamlin*, 1893, 2 B. C. R. 333; *Warner* v. *Symon-Kaye Syndicate*, 1894, 27 N. S. R. 340; *Jones* v. *England*, 1906, 7 Terr. L. R. 440, 5 W. L. R. 83 (Sask.); *Albert* v. *Marshall*, 1913, 48 N. S. R. 34, 15 D. L. R. 40; *Johnson* v. *L'Heureux*, 1914, 27 W. L. R. 21 (Sask.), 6 W. W. R. 53; *Flexlume Sign Co.* v. *Ettenberg*, 1916, Q. R. 50 S. C. 308.

There is, however, another line of cases in favour of the view that presentment before action is not essential, and therefore that the plaintiff is entitled to succeed against the maker without proving presentment,

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but if the maker is able to show that he had the money at the named place at maturity, the court may in its discretion deprive the successful plaintiff of the costs of the action.

See *Merchants Bank* v. *Henderson*, 1897, 28 O. R. 360; *Freeman* v. *Canadian Guardian Life Ins. Co.*, 1908, 17 O. L. R. 296; *Sinclair* v. *Deacon*, 1909, 7 E. L. R. 222 (P.E.I.); *Union Bank* v. *McCullough*, 1912, 4 Alta. L. R. 371, 7 D. L. R. 694; *Robertson* v. *Northwestern Register Co.*, 1910, 19 Man. R. 402 (divided court); *Canadian Bank of Commerce* v. *Bellamy*, 1915, 8 Sask. L. R. 381, 25 D. L. R. 133; *Haydon-Clinton National Bank* v. *Dixon*, 1916, 9 Alta. L. R. 303; *Sparks* v. *Conmee*, 1919, 45 O. L. R. 202.

It is obvious that when it is possible for different courts to take such different views of the section, there is something wrong with the language used. It is suggested that Parliament ought to make up its mind which of the two views of the section furnishes the preferable rule, and to amend s. 183 accordingly.

The present form of s. 183 is the result of an amendment made in the Senate, concurred in by the House of Commons without discussion, and, probably, without sufficient consideration. See Debates, House of Commons, 1890, vol. 2, col. 4264-5. The previous discussion of the subject in the Commons is to be found in Debates, 1890, vol. 1, col. 1418-9 1526-31.

When the wording of the necessary amendment of s. 183 has been adopted, the attention of Parliament should then be directed to s. 93 of the Canadian statute (as compared with s. 52 of the original statute), and s. 93 should be amended so as to make it conform with the amended wording of s. 183.

III. Protest.

The Canadian Bills of Exchange Act, s. 119, is as follows:

119. (1) Subject to the provisions of this Act, when a bill is protested the protest must be made or noted on the day of its dishonour.

(2) When a bill has been duly noted, the formal protest may be extended thereafter at any time as of the date of the noting.

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In the United Kingdom the corresponding provision of the Bills of Exchange Act, 1882—s. 51, sub-s. 4—was amended in 1917 so as to read as follows:

> Subject to the provisions of this Act, when a bill is noted or protested, it may be noted on the day of dishonour and must be noted not later than the next succeeding business day. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

It is suggested that the Canadian s. 119 should be amended so as to conform to the British section as amended. The effect under the Canadian Act would be to allow the same time for noting or protest as is now allowed for giving notice of dishonour or notice of protest. See ss. 97 and 126 of the Canadian Act.

IV. Wrong Designation or Mis-spelt Name.

The Canadian Bills of Exchange Act contains the following provisions:

> 35. (2) Where in a bill the drawee is wrongly designated or his name is mis-spelt, he may accept the bill as therein described, adding, if he thinks fit, his proper signature, or he may accept by his proper signature.
>
> 64. Where, in a bill payable to order, the payee or endorsee is wrongly designated, or his name is mis-spelt, he may endorse the bill as therein described, adding his proper signature; or he may endorse by his own proper signature.

In the United Kingdom the Bills of Exchange Act, 1882, has no provision corresponding with s. 35 (2), and the provision corresponding with s. 64 is as follows:

> 32. (4) Where, in a bill payable to order, the payee or endorsee is wrongly designated, or his name is mis-spelt, he may endorse the bill as therein described, adding, if he thinks fit, his proper signature.

It is obvious that ss. 35 (2) and 64 ought to be made to agree with each other, so that if the words "if he thinks fit" are retained in the former section they should be inserted in the latter. It is also suggested that the alternative now allowed by both sections of signing by the "proper signature," without signing

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as described in the bill, is open to objection and should be struck out.

The words "if he thinks fit" in the predecessor of the present s. 64 were struck out in the Senate. See Debates, House of Commons, 1890, vol. 2, col. 4262.

V. Onus of Proof.

The Canadian Bills of Exchange Act, s. 58, is as follows:

> 58. (1) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.
>
> (2) Every holder of a bill is *prima facie* deemed to be a holder in due course; but if, in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear, or illegality, the burden of proof that he is such holder in due course shall be on him, unless and until he proves that, subsequent to his alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course.

This section differs from the original section—the Bills of Exchange Act, 1882, s. 30—in two respects. The words "the burden of proof that he is such holder in due course shall be on him" have been substituted for the words "the burden of proof is shifted," and, at the end of the section, the words "by some other holder in due course" have been added. The first difference is probably immaterial, but the last seven words in the Canadian section render obscure, if they do not render meaningless, the latter part of the section.

The effect of the original section, as explained in the case of *Tatam* v. *Haslar*, 1889, 23 Q. B. D. 345, at p. 349, is to make it clear that if the defendant proves fraud or illegality, or if fraud or illegality is admitted, the plaintiff, who up to that time is presumed to be a holder in due course, must now prove not only that value was given, but that it was given in good faith. The plaintiff may discharge this onus by showing that he or some one through whom he claims gave value in good faith. The last seven words of the Canadian section confuse the real purpose of the original section

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by declaring that value must have been given in good faith *by some other holder in due course.* Generally there will be no such person as "some other holder in due course," and it is suggested that the last seven words of the section be struck out.

VI. Purchase of a Patent Right.

The Canadian Bills of Exchange Act contains the following provisions:

> 14. (1) Every bill or note the consideration of which consists, in whole or in part, of the purchase money of a patent right, or of a partial interest, limited geographically or otherwise, in a patent right, shall have written or printed prominently and legibly across the face thereof, before the same is issued, the words: *Given for a patent right.*
>
> (2) Without such words thereon, such instrument and any renewal thereof shall be void, except in the hands of a holder in due course, without notice of such consideration.
>
> 15. The endorsee or other transferee of any such instrument having the words aforesaid so printed or written thereon, shall take the same subject to any defence or set-off in respect of the whole or any part thereof which would have existed between the original parties.
>
> 16. Every one who issues, sells or transfers, by endorsement or delivery, any such instrument not having the words *Given for a patent right* printed or written in manner aforesaid across the face thereof, knowing the consideration of such instrument to have consisted, in whole or in part, of the purchase money of a patent right, or of a partial interest, limited geographically or otherwise, in a patent right, is guilty of an indictable offence and liable to imprisonment for any term not exceeding one year, or to such fine, not exceeding two hundred dollars, as the court thinks fit.

In the United Kingdom the Bills of Exchange Act contains no corresponding provisions. The sections were inserted reluctantly by the Minister of Justice in the Canadian bill. It is not clear why instruments given for a patent right should be treated in an exceptional manner, and it is suggested that the three sections should be repealed.

Sub-section 2 of s. 14 was added in the Senate. For the discussion of these sections in the Commons, see Debates, House of Commons, 1890, vol. 1, col. 115-7, 1415-7, 1520; vol. 2, col. 4262.

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VII. Crossed Cheques.

The Canadian Bills of Exchange Act provides:

> 175. Where a bank, in good faith and without negligence, receives for a customer payment of a cheque crossed generally or specially to itself, and the customer has no title, or a defective title thereto, the bank shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

It is suggested that this section should be amended by the addition of the following as sub-s. 2:

> (2) A bank receives payment for a customer within the meaning of this section, notwithstanding that it credits its customer with the amount of the cheque before receiving payment thereof.

It is true that crossed cheques are not much in use in Canada, but as the Canadian Act contains provisions relating to crossed cheques, and as the corresponding section (s. 82) of the original statute was in 1906 amended by the British Parliament in the manner suggested above, it would seem desirable to amend the Canadian statute for the sake of conformity. The intention of the amendment in the United Kingdom was to abolish the "inconvenient rule" (22 Law Quarterly Review, 452) established by the case of *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240.

The Canadian Act contains the following provision:

> 169. (7) A crossed cheque may be re-opened or uncrossed by the drawer writing between the transverse lines, the words *Pay cash*, and initialling the same.

There is no corresponding provision in the original statute—the Bills of Exchange Act, 1882, s. 77. Mr. Justice Russell in his commentary on the Bills of Exchange Act, 2nd ed., p. 464, referring to an article by the late Z. A. Lash, K.C., published in volume 6 of the Journal of the Canadian Bankers Association, says:

> [Mr. Lash] points out that this provision as to re-opening a crossed cheque does not appear in the English Act, and he

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expresses the fear that it was inserted in our Act without sufficient consideration of the consequences. He sees grave objections to it and very few advantages. If a cheque so treated should be presented for payment he would recommend the bank in every case to communicate with the drawer before paying. In his opinion, the [sub] section should be repealed.

VIII. Forged or Unauthorized Signature.

The Canadian Bills of Exchange Act, s. 49, includes the following proviso:

> Provided that,—
> (b) if a cheque payable to order is paid by the drawee upon a forged endorsement out of the funds of the drawer, or is so paid and charged to his account, the drawer shall have no right of action against the drawee for the recovery back of the amount so paid, nor any defence to any claim made by the drawee for the amount so paid, as the case may be, unless he gives notice in writing of such forgery to the drawee within one year after he has acquired notice of such forgery.

It would not be difficult to find various matters for adverse criticism in the language of ss. 49 and 50 of the Bills of Exchange Act, but it is proposed for the moment to refer to only one point of obvious incongruity which might well be remedied.

The proviso above quoted, applicable as between the drawer and the drawee of a cheque payable to order, which is paid by the drawee upon a forged endorsement, requires the drawer to give notice of the forgery to the drawee within one year after he has acquired notice of such forgery.

On the other hand s. 50 relates to the right of the drawee or acceptor of a bill, who pays it on a forged or unauthorized endorsement, to recover the amount paid from the person to whom it was paid or from any person who has endorsed the bill subsequently to the forged endorsement. This section requires notice of the endorsement being a forged or unauthorized endorsement to be given by the drawee or acceptor within a reasonable time after he has acquired notice that the endorsement is forged or unauthorized.

It is hard to understand why the time limit should be one year under s. 49 and a reasonable time under s. 50, and it is suggested that the proviso to s. 49 above

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quoted should be amended so as to make it conform with s. 50. This proviso was added by the Senate in 1890.

For the discussion of s. 49 in the Commons, see Debates, House of Commons, 1890, vol. 1, col. 111, 351-2, 1077 ff., 1090, 1521; vol. 2, col. 4262, 4405 ff.

The present s. 50 was adopted by Parliament in 1897 in place of an amending statute of 1891.

IX. Sight Bills and Days of Grace.

The Canadian Bills of Exchange Act provides:

> **23. A bill is payable on demand,**
> **(a) which is expressed to be payable on demand, or on presentation; or,**
> **(b) in which no time for payment is expressed.**
> **24. A bill is payable at a determinable future time, within the meaning of this Act, which is expressed to be payable,**
> **(a) at sight or at a fixed period after date or sight.**

In the United Kingdom the corresponding sections of the original statute—ss. 10 and 11—differ from the Canadian sections in that a bill payable at sight is a demand bill and is therefore payable without grace, whereas under the Canadian Act days of grace must be added to a sight bill.

According to the ordinary meaning of English words, a bill payable at sight means the same thing as a bill payable on demand or a bill payable on presentation, and it is artificial and illogical to say that a sight bill shall be payable three days after presentment, and that a demand bill shall be payable on presentment. It is therefore suggested that s. 23 be amended by inserting the words "or at sight" after the word "demand" in clause (a), and that s. 24 be amended by striking out the words "at sight or" in clause (a). This suggestion is not made in the expectation that it will be accepted, but merely to express a personal view. The custom of distinguishing between sight bills and demand bills is probably too securely established in Canada to permit of its being changed.

For the discussion of the subject in the Commons, see Debates, House of Commons, 1890, vol. 1, col. 106-8.

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THE DAY'S WORK.

By W. S. Buell, Barrister-at-Law.

The current number of the Law Reports containing the decisions of the House of Lords and of the Judicial Committee of the Privy Council published on November 2nd, being Part V. of 1921, Vol. II. Appeal Cases, affords another splendid specimen of the diversity of subjects considered by these eminent lawyers, and even more so of the many laws, of the many lands, of the British Empire. A summary of the cases in the number will best illustrate.

The House of Lords decided that the British Admiralty was not liable for the loss of a steamship which was sunk one black night in February, 1918, in the North Sea, by being rammed by a destroyer, both ships sailing without lights in accordance with Admiralty orders. The ship which was sunk had been requisitioned by the Admiralty on the terms of a charter-party, which provided that the steamship owners should take the risk of "all consequence of hostilities or warlike operations."[1]

In another case their Lordships had to decide which of two sets of insurers would have to bear the damage occasioned by a collision between a steamship which was proceeding in a convoy towards, and had almost reached, the United States, when she was run into one night in July, 1917, by H.M.S. Devonshire, which had come out from Halifax for the purpose of picking up a convoy. The steamship owners had insured with marine underwriters against sea risks, and with another association against war risks. In this case also both ships were exhibiting no lights and the night was very dark. The decision depended upon whether H.M.S. Devonshire was at the time proceeding upon a peaceful voyage with a view later on of

[1] *Attorney-General* v. *Ard Coasters, Limited*, p. 141.

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engaging in a warlike operation, or whether the warship while proceeding to her station in order to pick up a convoy was at the time she was so proceeding engaged in a warlike operation. Their Lordships took the latter view, and the insurers against war risks had to pay.[2]

From these warlike and interesting questions their Lordships next turned to the consideration of a term in a contract between a solicitor and his managing clerk, whereby the latter agreed that when he left the employ of the solicitor he would not practise within a radius of seven miles of the Town Hall of Tamworth, and the question decided was that this was a reasonable term and was not against public interest.[3]

Then we find their Lordships taking infinite pains in settling two cases arising out of the Income Tax Acts, which are now such a burden to many in England. They decided that a dividend of a limited company declared out of its current annual profits and distributed in the form of shares of the company could not be treated as income and so liable to super-tax, but were an addition to the capital of the shareholder. Four days were spent on the argument of these cases, which were taken together, there being no material distinction between the facts of the two cases.[4]

Six days were occupied in an argument as to whether insurance companies should pay income tax upon some £25,000 odd profits made by buying Treasury Bills maturing at three, six and nine months, at a discount. Their Lordships decided that these transactions came within the Income Tax Act, and were liable to income tax in respect of the profits arising therefrom.[5]

The next case was of a decidedly different character. One William Pedlar was an Irishman by birth,

[2] *Liverpool and London War Risks Insurance Association* v. *Marine Underwriters*, p. 141.
[3] *Fitch* v. *Dewes*, p. 158.
[4] *Commissioner of Inland Revenue* v. *Blott*, p. 171.
[5] *Brown* v. *National Provident Institution*, p. 222.

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who emigrated to America, and in January, 1916, was naturalized as a citizen of the United States of America. In March of the same year he returned to Ireland and took part in the rebellion of 1916 in Dublin. He was deported to Frongoch, and, on his release in May, 1917, returned to Ireland. One year later he was arrested and convicted on a charge of illegal drilling, and sent to gaol in Belfast for six months. When he was arrested he had with him £124 in cash and a cheque for £4 15s. 6d., which were seized by the police. Pedlar sued the Chief Commissioner of the Dublin Metropolitan Police, alleging detention and conversion of the cash and cheque, and claimed their return and damages. The Chief Commissioner alleged, but apparently was not able to prove, that the monies and cheque were the property of an illegal association and were in the plaintiff's possession for the illegal purpose of the said association at the time of the acts complained of. But he also alleged that the plaintiff was an alien and that the monies and cheque were taken and detained by an officer of the Crown by the direction of the Crown as an Act of State for the Defence of the Realm and for the prevention of crime. A certificate of the Chief Secretary for Ireland authorizing the seizure and detention of the monies and cheque was produced. The case turned upon the question whether the defence of "Act of State" was available against the plaintiff. Serjeant Sullivan, Serjeant McSweeney and Cecil Fforde, K.C., of the Irish Bar, appeared for the Chief Commissioner, while T. M. Healy, K.C., and John O'Byrne, also of the Irish Bar, represented Pedlar. There was an interesting discussion upon the respective rights of an alien ami, and an alien enemy, resident within the realm. It was held that Pedlar was entitled to recover his money. It was stated as settled law that when a wrong has been done by the King's officer to a British subject, the person wronged has no remedy against the Sovereign, for "the King can do no wrong"; but he may

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sue the King's officer for the tortious act, and the latter cannot plead the authority of the Sovereign, for "from the maxim that the King can do no wrong it follows as a necessary consequence that the King cannot authorize wrong." And it was shown that so long as a friendly alien remains in the country with the permission of the Sovereign, express or implied, he is a subject by local allegiance with a subject's rights and obligations.[6]

Next we find their Lordships affirming an order of the Court of Criminal Appeal quashing a conviction and ordering a re-trial of two prisoners, who had been wrongfully tried together and convicted, the one charged under one indictment for stealing certain skins, and the other under a separate indictment for receiving the skins knowing them to be stolen.[7]

And they decided that a County Judge had correctly held that the master of a steam tug who had been drowned accidentally was a workman "employed otherwise than by manual labour," and therefore was not a workman to whom the Workmen's Compensation Act applied.[8]

Now all the cases so far dealt with arose within the British Isles. But their Lordships had to consider the laws of various far-flung portions of the Empire. For instance, they were called upon to consider an appeal from a decision of the Supreme Court of Fiji. They affirmed a judgment of that Court awarding damages for the loss of a shipment of bananas occasioned by defective refrigerating chambers in a steamship plying between Fiji and Australia.[9]

Then they next had to consider the Roman-Dutch law as applied in Ceylon on an appeal from the Supreme Court of Ceylon. This decision also was affirmed. It was to the effect that if a person sells property without having title thereto, and subse-

[6] *Johnstone* v. *Pedlar*, p. 262.
[7] *Crane* v. *Director of Public Prosecutions*, p. 299.
[8] *Jaques* v. *Owners of Steam Tug Alexandria* p. 339.
[9] *Australasian United Steam Navigation Co.* v. *Hunt*, p. 351.

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quently obtains title, such title accrues to the purchaser and prevails over that of a person to whom the first person has given the property, after having obtained proper title. The style of cause was *Fernando* v. *Gunatillaka*.[10]

An appeal from the High Court of Australia was affirmed. The Crown in 1886 had granted to the respondent some fifty-six acres of land at Mount Fairy, New South Wales, and in 1915 the Commonwealth of Australia compulsorily acquired the land for the purpose of obtaining limestone upon or under the land for use in some buildings to be erected for the Commonwealth. The Crown Grantee claimed £100,000 compensation for loss of the land and limestone. The Government alleged that he had no property in the limestone and offered him only £1,200. The case turned upon the construction of certain Crown Lands Acts. The Judicial Committee found the respondent entitled to compensate for the limestone.[11]

From consideration of these questions which arose in the South Seas, the Judicial Committee next reviewed and affirmed the decision of the Court of Appeal of British Columbia that the Municipal Act exemption from rates and taxes of "every building set apart and in use for the public worship of God" applies to the land upon which such building is erected, as well as to the fabric itself.[12]

And from pronouncing upon the law of British Columbia, the attention of these Law Lords turned to an appeal from a decision of the Supreme Court of Nigeria (Southern Province), and they were concerned with the title to land held by a White Cap Chief of Lagos. The appellant was the head chief of the Oluwa family or community, and one of the Idejo White Cap Chiefs, and he succeeded. The Government expropriated his land and proposed to estimate his compensation upon the basis of his having merely

[10] *Fernando* v. *Gunatillaka*, p. 357.
[11] *Commonwealth of Australia* v. *Hazeldell, Limited*, p. 373.
[12] *City of Victoria* v. *Bishop of Vancouver Island*, p. 384.

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a right of control and management, not on the basis of absolute ownership. Their Lordships decided that the Chief was entitled to claim compensation on the footing that he was transferring to the Governor the land in question in full ownership. The appellant was personally present at the hearing of his appeal. He appeared in full native dress.[13]

Next came an appeal from the Supreme Court of Canada who had unanimously reversed a decision of the King's Bench (Appeal side) of the Province of Quebec, and the Judicial Committee agreed with the judgment of our Supreme Court. One Frost was a locomotive engineer of the Central Vermont Railway Co., but, in accordance with an agreement between that company and the Grand Trunk Railway Company, he was driving a train on the line of the latter company between Montreal and St. Albans, Vermont, and negligently failed to attend to Grand Trunk signals with the result that he ran into a Grand Trunk engine and killed a locomotive fireman thereon. The widow of the fireman received compensation from the Grand Trunk Railway under the Workmen's Compensation Act, and this disentitled her to raise any action against the Grand Trunk. However, she sued the Central Vermont Railway Company on the plea that her husband had been killed by reason of the negligence of an employee of that company. Their Lordships in deciding in favour of the company quoted a decision which they had so recently decided on an appeal from the Supreme Court of China, Shanghai, that it had not yet been reported. The question was in whose employ was Frost at the time of the accident. He was paid by the Central Vermont, but payment, they held, was only a circumstance pointing to who is employer, the real test is control, and at the moment of the accident the control of Frost was in the Grand Trunk. As one of the Quebec Judges put it, where a man who has committed the tortious act has been lent, or sub-con-

[13] *Amodu Tijani* v. *Secretary of Southern Nigeria*, p. 399.

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tracted, to another master temporarily, it is the "patron momentane" and not the "patron habituel" who is responsible.[14]

The Privy Council also affirmed the decision of the Court of Appeal of British Columbia in the case of the *Canadian Pacific Wine Co.* v. *Tuley*, finding the British Columbia Prohibition Act of 1916 and amending statutes to be *intra vires* and justifying the seizure by the police of the books, papers and stock of liquor in the appellants' warehouse.[15]

To completely vary the questions brought before the Privy Council, the last case reported in Part V. was an appeal of one of the numerous Fish and Game Clubs, who have sporting preserves in the Province of Quebec, and who succeeded in having a judgment of the Supreme Court of Canada reversed and in obtaining from the highest tribunal of the Empire a declaration that they are the sole proprietors of the bed of the River Metapedia fronting a certain lot and of the fishing rights therein. They had obtained their title through Lord Mount Stephen, whose death has been so recently deplored.[16]

Surely the Law Lords of the House of Lords and of the Privy Council must obtain a wonderfully wide knowledge of the life and practices of the people, as well as the laws, of all parts of the Empire.

[14] *Bain* v. *Central Vermont Ry. Co.*, p. 412.
[15] P. 417.
[16] *Matamajaw Salmon Club* v. *Duchaine*, p. 426.

W. S. BUELL.

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NOTABLE CASES NOTATED.

Constitutional Law—Dominion Authority over Trade and Commerce.

The case of *Attorney-General for Canada* v. *Attorney-General for Alberta and Others,*[1] is the second decision recently delivered by the Privy Council drawing quite new lines between the legislative authority of the Dominion and of the Province. The other case to which we refer is *Canadian Pacific Wine Co.* v. *Tulley et al.;*[2] and we commented upon it in the C. L. T., Vol. 41, p. 705.

The first named case of *Attorney-General Dominion* v. *Attorney-General Alberta* deals with the ill-starred and ill-fated Board of Commerce. This Board was established by the Board of Commerce Act 1919, and its duty was to administer the Combines and Fair Prices Act 1919. Soon after it went into operation in 1920 we commented strongly upon its constitutionality. And now we are gratified by the decision of the Privy Council that the whole Act, and especially the functions conferred upon the Commissioners and the methods by which they proceeded to enforce them, were all *ultra vires*—were in truth an invasion of the Provinces' authority over Property and Civil Rights under section 92.

It is necessary to emphasise this, as up till now there has been a shirking of responsibility by both the Dominion and the Provinces owing to the doubtfulness of the authority of either, or at least doubtfulness as to which had the authority. It is now decided that the Dominion has not, and that the Province has, the authority to deal with Trade Combines which control and inflate prices at their own sweet will. No doubt if the Dominion knew how to go about it, it could enact general regulatory principles of Trade and Commerce which the Provinces could enforce and

[1] 38 T. L. R., p. 90.
[2] 37 T. L. R. 944.

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if need be supplement. But in the case under the Fair Prices Act 1919, the Board of Commerce was authorized to restrain and prohibit the formation and operation of such Trade Combines as it might consider detrimental to the public interest. It could also restrict accumulations of the necessaries of life, in the case of private persons, just as it could do in the case of a Trader for his business; and it could order the disposal of any surplus above the necessity at fair prices.

The sanction for any violation of an Order of the Board of Commerce was worked out under the Criminal Law and procedure of the Dominion.

The Supreme Court of Canada was equally divided on the question. But the Privy Council has held emphatically that the authority to regulate Trade and Commerce conferred on the Dominion by section 91 could not interfere with the authority over Civil Rights and Property conferred on the Province by section 92, and that the Board of Commerce Act and the Fair Prices Act 1919 were an invasion by the Dominion of the authority of the Province.

Now it is up to the Province to get away from its crawling and to enact sane and healthy laws to curb and control the wholesale swindling operations which go on by combines, as they are called, among all classes of traders for keeping prices at a uniformity or more distinctly at a uniform level of extortion. Competition is removed by these combines and prices are fixed in the interest of the seller.

The provincial Legislatures are fortified in what they do by the second case referred to, *Canadian Pacific* v. *Tulley et al.*, which lays it down that outside the Criminal authority of the Dominion Parliament, the Province has for matters within its own area, and not covered by the general Criminal Laws of the Dominion, an authority of a Criminal or quasi-criminal character. It could for instance prohibit the operations of these trade or huckster combines for fixing prices, impose a fine or penalty for disobedience, and collect it under the Summary Jurisdiction Act.

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Though we have grudgingly assented to the Privy Council decision in the *Canadian Pacific Co.* v. *Tulley* so far as it asserts the right of the Province to regulate the procedure in the Criminal or Semi-criminal Law which it enacts, yet the Privy Council, having held that such Laws can be enacted by the Province, it is ultimately for the advantage of the Province itself and the public that the Legislature also should control the procedure.

But until the decision referred to was given, it was not possible with any certainty for any lawyer, however able, to have given to section 91 (27) and section 92 (14) any interpretation other than that "procedure in Criminal matters" was solely reserved to the Dominion Parliament and that it included procedure for enforcing any penalty, fine or imprisonment imposed by the Provincial Legislature for violating any Law enacted by it. Now we know, and must in future recognize, that the Province controls procedure in such matters of quasi-criminal Law, as the Privy Council holds it has authority to enact under section 92 (16), "generally all matters of a merely local or private nature in the Province"—Temperance Laws, I may say, both in regard to liquor and to extortionate Trade organizations.

Trade Combines.

Since the case of *Allen* v. *Flood*,[2] the law of Torts has been developing somewhat rapidly by a manifest strenuousness on the part of the Courts to control modern conditions by the application to them of old principles. The dangerous element of this is that the old principles dealt with the individual, whereas in recent times the individual has largely disappeared or been submerged; and combines of employees and employers have taken his place. Can a combine do what an individual may do? It can I would say; but it should stop just there; and the Law should keep it just there. But it has not done so. If it had done so there would be none of the jarring elements which we

[2] 1898 A. C. 1.

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find in the cases decided since 1898 — in *Quinn* v. *Leathem*,[4] *Pratt* v. *British Medical Association*,[5] and in *Hodges* v. *Webb*.[6] To these we add the last case before us, *Ware & DeFreville Limited* v. *Motor Trade Association*.[7] It is manifest in the judgments in the last named case that the Judges were straining under the fetters imposed by the earlier cases; and that if the subject were before them *de novo* somewhat different conclusions would have been reached. The Judges in 1898 had no perception or perspective of present day conditions.

In the case of *Ware* v. *Motor Trade Association*, it appears that a certain Motor Manufacturer placed his cars on the market at a price which the seller or agent could not vary either upwards or downwards. He was a member of the Defendant Motor Trade Association which was organized on the basis that Members of it could fix prices just as this particular maker had done; and that any person infringing the regulation of the maker as to price could be placed on a stop or black list published by the Defendant Association. While on this black list, no one who was a member of the Association could supply to the so-called delinquent any Automobile or any of the accessories. The Plaintiff *Ware Co.* had advertised for an Owner of a Car, its sale at a price actually above the price fixed by the maker who was a Member of the Defendant Motor Trade Association; and the consequences followed. The Plaintiff Ware was put on the black list and was practically boycotted—at all events the Plaintiff was put out of the business of dealing with autos made by or sold by Members of the Motor Trade Association. If the Association had been wide enough the Plaintiff would have been absolutely boycotted. But it appears the Association did not include all the manufacturers of autos, and consequently the case was put on the basis that the seller could choose the person to whom

[4] 1901 A. C. 495.
[5] (1919), 1 K. B. 244.
[6] (1920), 2 Ch. 70.
[7] 3 K. B. 40.

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he would sell, and that an Association designed to carry out this control was not illegal. The action was framed as one for libel in the placing of the Plaintiffs' name on the black list and publishing it.

Scrutton, L.J., in the Court of Appeal, put the issue thus:—"Whether a combination (1) intended to secure that new goods shall be sold at a fixed price, neither higher nor lower, by refusing to supply with goods a person who sells those goods at other than the fixed price; and (2) to inform the confederation who such persons are by means of a stop (or black) list; and (3) to take steps to insure that the person who is not to be supplied with goods directly is not supplied with them indirectly; is a reasonable and legitimate means of protecting trade interests."

The Court answered in the affirmative.

But did the Court state the true problem?

One man could stipulate what he liked about fixing his price for the auto which he manufactured. But his only remedy for a violation of his terms would, if they had been accepted and assented to, be an action for damages with the further remedy of declining any further dealing with the delinquent. He could not influence the acts of others except in a very restricted way indeed—in a way which would virtually leave the delinquent and other auto-makers absolutely free to deal with one another as they saw fit.

The combination or Association here comes on the scene as an auxiliary of the autocratic price-fixing manufacturer and supplies to him a sanction in the way of a combined boycott by all of its members of the agent or seller who violates the terms of sale of one of them only. Surely in this way Combination is doing something more than the individual could do or would attempt to do.

We must get at the root or principle that a Combination, while it may do what an individual man may do, can do no more, and it cannot be made an instrument of oppression or act as an invader or violater of the right of an individual to buy and sell as he listeth.

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We refrain here from further comment as we intend on an early date to fully examine the cases and the Law generally on the subject.

A Wife's Separate Domicile.

The Law of Domicile is that part of the Law of Divorce which has given most perplexity to the Judges of Western Canada, where it has quite recently been put into force through a Judgment of the Privy Council, though the Law itself had been enacted so long ago as 1880 by the Parliament of Canada.

It is an old maxim of the Law relating to the marriage status that the domicile of the husband is the domicile of the wife. But certain *dicta* of Lord Cranworth in *Dolphin* v. *Dolphin*,[8] and of Sir R. Phillimore (President of the Probate and Divorce Division), in *Le Sueur* v. *Le Sueur*,[9] seem to have projected the problem into the arena of doubt or uncertainty. It has, however, been brought back to the position of absolute certainty by *Lord Advocate* v. *Jaffrey*,[10] which swept away absolutely the *dicta* referred to.

Once more we know authoritatively that the domicile of the husband, while he lives and while the marriage subsists in Law, is the domicile of the wife for all purposes of legal proceedings.

Construction of Written Document.

The legal effect of a written document cannot be changed or varied by a declaration of intention in the document itself.

This point incidentally arose in *County Hotel* v. *L. & N. W. Rly.*[11] The authority for the principle is *Furnival.* v. *Coombes*.[12] In that case there was a covenant by Churchwardens in their individual names to pay a certain sum of money. They purported to contract as a Corporation, and there was an express provision that the deed was not to create "any personal cove-

[8] (1859), 7 H. L. C. 390.
[9] (1876), 1 P. D. 139.
[10] (1921), 1 A. C. 146.
[11] (1921), 1 A. C. 85.
[12] (1843), 5 Man. & G. 736; 12 L. J. C. P. 265.

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nant or obligation" upon these persons. The deed would have been inoperative unless they were personally bound to the performance as they were not as Churchwardens incorporated for this purpose, and the proviso about non-personal liability was rejected as repugnant and void. In another case of *Ex parte Delhasse,*[13] a person had advanced money under circumstances which constituted a partnership, but he sought to escape the consequence, relying upon a clause that a partnership should not be deemed to have been constituted, but this contention failed. "In my opinion the mere insertion of a proviso that there shall not be a partnership cannot alter the real nature of the transaction," said James, L.J. Yet another case on this subject: *Sudbury* v. *Empire Electric,*[14] Judge Warrington there said: "If you take the agreement as a whole and see that it does transfer powers or duties it is impossible to give any effect to a statement by the parties that nothing shall be deemed to do so. If the Agreement does transfer them, it does transfer them. That clause is merely a statement that as between themselves, so far as they are capable of contracting, it shall not be treated as transferring or assigning any of their powers or duties. If the agreement in fact does it, I do not think I can give any effect to the declaration that they do not intend to do it."

So that intention even expressed in writing is not everything in construing a written contract.

Jurisdiction of Inferior Court.

Rex v. *Cheshire County Court Judge, Ex parte Malone,*[15] is the most recent authority that the jurisdiction of an inferior Court cannot be enlarged by any hypothesis. This point is important in regard to such a Court as the Surrogate Court which the Court of Appeal in Saskatchewan has held to be a very inferior Court indeed, being neither a Superior nor a District nor a County Court.

[13] 7 Ch. D. 511.
[14] 74 L. J. Ch. 442.
[15] (1921), 2 K. B. 694.

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One is urged to ask what then is it? Its functions are some of the highest functions of the Supreme Court in every Country; and, except that it is restricted in area, there is no limitation of its jurisdiction with regard to the amount of an Estate. Its jurisdiction therefore ought to be emphatically and clearly defined, and not stated in the general phraseology of "matters testamentary . . . in relation to the granting or revoking Probate of Wills and Letters of Administration." Strictly construed, this means just what it says and no more. The Rules of Court, however, seem to contemplate some further jurisdiction, but this is, in the words of *Rex* v. *Cheshire C. C. Judge,* an hypothesis.

We must recur to this subject later unless something is done in the way of defining the Jurisdiction of the Surrogate Court by something better than a general phrase plus some rules of Court which are not Law but merely regulations of procedure.

Doctrine of Election.

King v. *Paulson*[16] once more affirms the doctrine about which it is hardly possible to conceive that any doubt exists, namely, the doctrine that an election once made it irrevocable. Vide *Campbell* v. *Fleming,*[17] and *Law* v. *Law.*[18] In this last case of *King* v. *Paulson,* however, the doubt was prominent and strongly urged. It has got its quietus.

King v. *Paulson* had another point to determine, namely, that parties cannot make substantive law by their agreement; and accordingly that a provision requiring a waiver of a breach of covenant to be in writing did not prevent an effective waiver by receipt of rent with knowledge of the breach.

This is one of the points of frequent recurrence which the practising lawyer should keep constantly before him.

[16] (1921), 1 A. C. 271.
[17] 1 Ad. & E. 40.
[18] 74 L. J. Ch. 169.

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Are Directors of a Company Trustees?

The case of *Sun Permanent Society* v. *Western Suburban Society*,[19] gives a coup over to the oft-repeated theory that Directors of a Company are Trustees or that they occupy a fiduciary position.

They are, it is true, under obligations somewhat similar to Trustees or to persons in a fiduciary position, but they are not Trustees or clothed with all the obligations of Trustees.

The Directors of the Defendant Society had agreed to take over the Mortgage Securities of the Plaintiff Society which was in liquidation. One objection to complete was based on the ground that the investment would amount to a misfeasance on the part of the Directors and "being a breach of trust" specific performance ought to be refused.

It was held that the Directors are agents and not Trustees, and though their liability might be the same in substance it is not so in degree. Lawrence, J., said: "I know of no case where the Court has refused to decree specific performance of a contract for the sale of land merely because the Defendant's authorized agent, acting honestly, has committed some breach of duty towards his principal of entering into it; much less where he had done so owing merely to a want of prudence or an error of judgment, and where in either case the purchaser had no knowledge or notice of any irregularity on the part of the Vendor's Agent. To give countenance to such doctrine would be highly mischievous."

Recovery of Money Paid by Bet.

Robinson v. *Marsh*[20] is yet another case on the Gaming Act 1835. The Plaintiff lost £2,685 at cards and paid £2,700 by cheque to the winner, the odd £15 representing a previous loan of that amount. Only a portion of the cheque therefore represented an illegal consideration. This, the Court held, did not pre-

[19] (1921), 2 Ch. 83.
[20] (1921), 2 K. B. 640.

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vent the Plaintiff recovering back such portion of the cheque under section 2 as was paid for an illegal consideration—the lost bet.

If promises are severable fraud in one will not vitiate the other: *Pickering* v. *Ilfracombe Rly.*[21]

Questions on this severability arising out of covenants in restraint of Trade are: *Attwood* v. *Lamont*,[22] *Southall* v. *Rigg*.[23]

The recovery of a bet or money paid as such rests not on a failure or partial failure of consideration, or upon an illegal security. It rests upon a Statute—the Gaming Act—which creates the cause of action. Recovery is a statutory right.

Transferee of Cheque Obtained by Fraud.

The Court of Appeal in England in *Banque Belge* v. *Hambrouck*,[24] decides an important question which often arises, namely, that if a cheque be obtained by fraud and then transferred by the fraudulent holder without consideration, the transferee acquires no better title than had the fraudulent holder.

It was held further that the Banker on whom certain cheques had been drawn by fraud, having paid them, could follow the money in the hands of subsequent parties who had acquired it for an illegal or for no consideration. The facts were:—A clerk by fraud obtained certain cheques from his employer on the Plaintiff Bank. They were paid through another Bank and credited to the clerk. He in turn issued cheques on the amount so fraudulently to his credit, to a woman with whom he was living, either for no consideration or for an illegal one. She in her turn placed these cheques to her own credit, but she knew nothing as to the source of the money in the Bank from which her cheques were paid.

The Plaintiff Bank sued the woman and her Banker for a declaration that the money standing to the

[21] 37 L. J. C. P. 118.
[22] 89 L. J. K. B. 965.
[23] 20 L. J. C. P. 145.
[24] (1921), 1 K. B. 321.

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woman's credit was their money; and the Court gave Judgment accordingly.

The case of *Re Hallett*[25] was referred to and *Sinclair* v. *Brougham*.[26]

Hallett's case established this; that where money held by a person in a fiduciary character has been paid by him to his own account at his Bankers, the person for whom he held the money can follow it and has a charge on the balance in the Banker's hands. Moreover, if the fiduciary holder of money pays it into his own Bank account and mixes it with his own and afterwards draws out, by cheques, various sums from the general fund, that the drawer must be taken to have drawn out his own money in preference to the trust money.

But it was made clear by Fry, J., that the rule in *Claytons' Case*[27] which attributes the drawing out from a Bank account, where there are several funds, to the order in which the money was paid in—does not apply where there is one fund and it can be traced. It does apply where there are two *cestuis que trust* whose moneys the Trustee has paid into his own account at his Bankers and thus mixed them.

[25] 13 Ch. D. 696.
[26] (1914), A. C. 398.
[27] 1 Mer. 572.

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MISDESCRIPTIONS IN WILLS.

DEAR SIR.—It may be worth while calling attention to a matter which in its present position is apt to mislead.

One of the latest decisions upon the subject which forms the heading of this letter is the judgment of Mr. Justice Riddell in the case of *Re Clement*.[1]

In that judgment the learned judge gives a very complete resume of the law and cases, and refers to the well recognized fact that there are two distinct lines of authority upon the subject, distinctly opposed to one another.

The learned judge cites certain leading cases on either side.

The points in question relate to the extent to which intrinsic evidence is admissible to explain the misdescription, and the jurisdiction of the Court to correct the error. Among the cases cited by the learned judge as authorities for the admission of evidence is found *Re Shaver*,[2]

Presumably this case was cited to the Court (no doubt inadvertently), by counsel, on the argument.

My object in writing is to point out that *Re Shaver* is practically an over-ruled case.

The decision was one of the late Chancellor Boyd —on an *ex parte* application.

It seems to have been at the time undoubtedly out of harmony with the approved cases.

Some years later the same question came again before the late Chancellor in the case of *Hickey* v. *Stover*.[3]

In this latter case the Chancellor spoke as follows:—"I am inclined to think that I went too far in *Re Shaver*, but sitting here in Divisional Court I am not bound by it," and the Divisional Court declined to follow *Re Shaver*.

[1] 22 O. L. R. 121.
[2] 6 O. R. 312.
[3] 11 O. R. 106.

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While upon this subject of misdescription in wills, perhaps I may be permitted to again call attention to the unsatisfactory state of the law in regard thereto. I did this in a letter to your Journal some years ago,[4] referring to an article of mine upon the subject which had then recently appeared in your Journal.

Perhaps I cannot deal more briefly with the matter than by quoting from that letter as follows:—

"The other matter on which I desire to remark is one which I have already brought forward in your Journal.[5] It relates to the erroneous descriptions of the subject of gifts by will. I need not deal with it at length here, as the position and the cases on the subject are fully discussed in the article in question. The position in a nutshell is as follows: A., owning the south-east quarter of lot 1 in the 2nd concession of the township of Blank, and no other land, devises, 'the south-west quarter of lot 1 in the second concession of,' etc. (by mistake calling the land the south-west quarter of the lot.) B., owning the south-east quarter of lot 3 in the fourth concession of the township of Blank and no other land, devises 'my farm, being the south-west quarter of lot 3, in the fourth concession of,' etc., making a similar mistake in the description. As the law stands at present the former devise is nugatory, and the Courts are powerless to afford relief; while the latter devise is perfectly valid, the Court having no difficulty in correcting the mistake. This state of the law is a pitfall for testators, who are notoriously careless about exact description of land in their wills. The hardship of such cases has been felt and deprecated by the judges, at the same time that they felt themselves constrained to enforce it. See *Hickey* v. *Stover*, 11 Ont. R. 106. A very simple and obvious remedy might be applied in this case. It is indicated by the judgment of the Chancellor in *Hickey* v. *Stover*. It is clear that the learned Chancellor in dealing with that case felt himself trammelled by the fact that as the law stood there was no warrant

[4] 19 C. L. T., p. 79.
[5] XVII. C. L. T. 201.

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for 'introducing the assumption that the testatrix meant to devise her own land.' No one for a moment doubts that in ninety-nine cases out of a hundred that is the intention actuating a testator when he sits down to make his will; an intention to deal in his will with his own property, and not with property belonging to somebody else. The amendment, therefore, which I would suggest, is the introduction of that assumption, by legislation, in all cases. A provision to the following effect would probably cover the whole ground, viz.: 'Unless an intention to the contrary appears, all wills shall be construed as though the subject of every devise or bequest therein contained were immediately preceded by the words 'my property being', or words to the like effect.' ''

The only remark I would add to the above is that the evil pointed out is still continuing, and causing expense and annoyance to the public.

I have no doubt scores of similar cases have been brought before the Courts since my above-mentioned article was written.

Only so recently as within the last month I was, myself, concerned in a case upon precisely the same point, and no doubt innumerable others will arise in the future unless a remedy is applied.

Yours truly,

F. P. BETTS.

London, Ontario.

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BOOK REVIEWS.

A Digest of English Civil Law, by Edward Jenks, M.A., B.C.L., and others. London: Butterworth & Co.; Toronto: The Carswell Co., Ltd.

This is the second Edition of what we must call a great work; and it is really a consolidated Edition of a work which has appeared in eleven instalments during the past 16 years. The favour extended to the instalments has given us this Consolidated Edition revised and brought down to date with an entirely new Table of Statutes and Cases and a comprehensive index.

In expending the labour referred to upon the Consolidated Edition the authors well know the worth of the work. It claims to be "an honest, intelligent and industrious attempt to reduce the class of existing materials to simplicity and order." It is a modest claim surely for a work which is unique as well as monumental. It transcends anything of the kind ever produced. In two volumes, divided into five books and containing in all less than 1,450 pages, the authors have managed to present to us in clear, concise and condensed paragraphs virtually all the Laws of England. It is certainly a marvel; and it could only have been the linking of genius with genuine industry that produced such a work.

The accuracy with which, often out of jumbled masses of Case Law, a recondite principle is extracted and stated with the precision of an axiom in Euclid is to say the least marvellous. But the practical lawyer who uses this work passes instantly from marvel to gratitude, for he finds to his hand not only the root-conception which he seeks, but select references to the authorities. The skill of the selections is manifest at every point.

We have deliberately turned up the work at various points and we have found the same unerring accuracy and precision. The Tort of Conspiracy—one of the

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vague brain-racking subjects in these days of Trade Combines—was one of the branches we turned up. All the cases from *Allen* v. *Flood* onward, with their infinitudes of jarring notes and themes, some conjectural and some obiter, seem to be refined to an essence without impairing the real virtue and pungency of any of the ingredients.

We got more thorough apprehension of our subject from three or four paragraphs of this work than we had gleaned from hours of previous study in other fields.

The philosophic student may read this work with relish, and the Professor of Law in our Colleges and Schools cannot dispense with it; while the Practical Lawyer will save valuable time by having it at hand not only for quick and ready reference, but for an exact statement of the Law he requires with the authorities sifted out of masses of cases where some principle was for years struggling for birth.

The authors have placed every Lawyer under an obligation by this unique work.

B. T.

THE SALE OF GOODS ACT.

The Sale of Goods Act, by John Delatre Falconbridge, M.A., LL.B.

This is one of a series of Law Books written by Mr. Falconbridge, of which "Banking and Bills of Exchange" is another, and "The Law of Mortgages" is a third. They are all noted for their reliability; and "The Sale of Goods Act" is no exception.

We find the points taken by Mr. Falconbridge in expounding the text exemplified by leading cases, some in England and some in Canada; and he has not failed to draw on—and to acknowledge the fact—both Benjamin on Sales and Chalmers on the Sale of Goods Act.

As some of us in Canada are wont to wander into American Cases oblivious of the differences in the statute law of the two countries, Mr. Falconbridge

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points out again and again as a safeguard the difference between the provisions of the Uniform Sales Act, which operates in many of the States, and the Sale of Goods Act as it is now in operation in all the Provinces of Canada except Quebec.

There are many points in Mr. Falconbridge's work which we fail to find in either of the two English works referred to. This is inevitable, for the conditions of the two countries are quite different and consequently produce very different problems.

For the practitioner we really think this volume is an indispensable, and it is equally so for the student or the business man who only wants a general apprehension of the Law relating to the Sale of Goods.

The index is most facilitative; and the cases are thoroughly up to date.

B. T.

A TREATISE ON DOMINION INCOME TAX LAW.

A Treatise on Dominion Income Tax Law, by Charles P. Plaxton & F. P. Varcoe, Barristers-at-law. Toronto: The Carswell Co., Ltd.

This is certainly an indispensable work for every Lawyer engaged in solving questions under Dominion Income Tax Law; and the authors have left nothing undone both in stating the principles involved and the cases which have been decided upon the construction of the various Income Tax Acts of the Dominion.

The Chapter on the nature, history, and constitutional aspects of Income Tax gives a splendid preliminary grasp of the subjects which follow—the Construction of the Statutes; Persons taxable; Exemptions and other matters.

As far as it is possible for the authors to do so, they have faced and clarified the riddle so often presented to the Lawyer by his Client who is saddled with an Income Tax by three different taxing authorities.

The triple impost seems to jar upon our apprehensions of the rightful use of the taxing authority. So

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far the question has not been judicially determined though certain dicta in Parsons' Case, in the *Bank of Toronto* v. *Lambe* and in the Fisheries Case are brought forward by the authors in support of their view that the Income Tax is imposable by all three Taxing Authorities—the Dominion, the Province and the Municipality. Until it is decided we can only disagree—at least this is not the place for a controversy whether the Provincial Legislature can create a Municipality and derogate to it an authority to tax a man on his income while reserving to itself the authority to tax the same income. This is totally different from a tax on the same income by the Dominion and the Province. The authors, however, hold the triple tax is illegal.

The authors have spared no pains in giving to the professional man a compendious and masterly exposition of the subject from the practical aspects in which it is constantly presenting itself. All the English as well as Canadian cases on the subject are cited and brought up to date; and the authors have given the clearest evidence of their own study and mastery of the questions involved by the clear and precise manner in which they state them pro and con, and then furnish a solvent conclusion for the complexity whatever it may be.

It is a splendid work, excellently carried out; and it should be added to the library of every practising Lawyer in the Dominion as being the last and best exposition of the Dominion Income Tax Acts.

B. T.

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The
Canadian Law Times.

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EDITORIAL.

Business Combinations—Parliamentary Divorce.

It has been found necessary to postpone till the March number, the continuance of the series of Articles on "Business Combines" commenced in the issue of last month. This is not so much a matter of intention as of necessity.

We felt obliged in view of the immediate opening of a new Parliament to give an Answer to the Letter of Mr. R. V. Sinclair, K.C., on the Parliamentary Divorce issue raised in the CANADIAN LAW TIMES and discussed at intervals during the past couple of years: And we have done so in subsequent pages.

Our Business Combinations are not likely to be handled in a hurry by a newly-elected Parliament; but possibly the Old Canker of Parliamentary Divorce might receive some attention. So we became utilitarian for once, and discarding idealism, gave our last word on the practical—aye, and pressing—problem of whether the Parliament of Canada really can divorce people as it has been pretending and assuming to do for well-nigh 50 years.

In the problem there are many questions involved, any one of which would provide material for a Treatise. One question is: Whether the Parliament of Canada can play the Autocrat and violate the contractual Rights of a Husband and Wife by dissolving the Marriage Contract without any judicial arbitra-

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ment of the dispute between the parties, without anything in the nature of a Judgment of the Peers of the parties, and without any "Law of the Land" to support, authorize or sanction such an autocratic act or proceeding?

I have written it over and over again: the Parliament of Canada has no Law for what it does; and however just its Divorce Act may be on the revealed facts, it is an Act of autocratic dominance and not of Constitutional Authority.

Where is the Magna Charta in face of such a procedure?

The Parliament of Canada would require all its concentrated force and skill to over-ride, or even to change, a single word in the Magna Charta. It was constituted subject to that great bulwark of the Liberties and Rights of the People against the incursions of autocratic Sovereigns; and this bulwark is just as effectual against the incursions of autocratic Parliament. It is impregnable against the incursions of such a Parliament as we have in Canada—a Parliament which refuses to exercise its Constitutional authority to enact a general Divorce Law by which the Civil Rights of the People in regard to Divorce might be determined, and in its stead assumes two rôles—one Autocratic and the other Sycophantic. The Autocratic rôle is to destroy without law, or the semblance of law, the Civil Rights of a Husband and Wife under a Marriage Contract; and the Sycophantic rôle is to cower and cringe to the intolerant element of Ecclesiasticism which though supplanted by the Reformation still seeks to impose upon us Canonical dicta or bigotries, and objects to a general Law of Divorce on the ground that Marriages are made in Heaven. Even if they are, it is a mere matter of jurisdiction as to the most competent authority to dissolve them; and is the Senate of Canada preferable as a judicature to the Judges of the Civil Courts of the Country?

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People are being divorced by the hundred in Canada through the Senate and Parliament, so that a general Law will not introduce Divorces, but it will abolish a system which smacks of the crudities and intolerances of the Middle Ages, in addition to the appalling fact that it is devoid of every element of legality.

K. C. Status.

A Barrister of high standing in Ontario has sent us his views on this important theme which we publish in this issue.

We would really appreciate and we will publish all the views we can get. It ought to be a subject to evoke expressions of opinion having regard to the vast disparity there is between what one might call the ideals and the practices in the past.

It is amazing to see all over Canada the class of men who are sometimes dignified by the K. C. status or degree, and side by side with them a thousand times more able and worthy men bereft of it. Political considerations, and those of the most contemptible type, have arrayed the one without legal merit, and left the other undignified who is really a jurist and ornament of the Profession. These practices should no longer prevail; and they will be abolished once the recommendation or nomination for the dignity is transferred from the political caucus to the Judiciary.

We ought to see that the prestige of our profession is preserved. Its honours ought not to be debased to the requiting of political services. They ought to be made to distinguish legal eminence and character; and the Judges who have the nomination should not be trammelled, in our view, with considerations such as are laid out in the contribution on another page. This, however, is a matter of opinion. And on the subject we want opinions.

A Law or College degree should not, I think, be a *sine qua non.* Some of our greatest lawyers—jurists

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and advocates—have been men who have risen from humble surroundings in which they were precluded from a College course either in general learning or in Law. I am writing from memory, but I doubt whether Lord Russell of Killowen (Sir Charles Russell as he was known at the Bar for years) or Sir Edward Clarke, or Sir Rufus Isaacs, now Lord Reading, ever had a Law or College Degree. I doubt also whether the greatest of them all, Lord Erskine, had such a Degree. Russell and Clarke were the rival advocates at the English Bar when I first remember them. In their sphere they had no compeers, and almost invariably when one was retained for the Plaintiff, the other was retained for the Defendant. Russell started as a Police Court Solicitor in Belfast; and would have become the Lord Chancellor of England but for the fact that he was of the Catholic Faith.

Without being much of either a practising lawyer or advocate a man might very well be worthy of the K. C. Degree. Take Sir Frederick Pollock for instance. Look at his great performances in the masterly expositions of the law in his well-known Books, and Contributions to the Law Quarterly of which he was Editor for many years. Yet I doubt if he could present the array stipulated by our correspondent as the minimum of leading cases in which he had been counsel to justify his receiving the K. C. Degree.

The best suggestion, so far, is to leave it entirely to the Judges; for they can estimate a man's worthiness for the honour both from the legal and character aspects; and both aspects are necessary in reckoning up a man's eligibility and in making the recommendation to the Crown.

B. T.

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PARLIAMENTARY DIVORCE.

By Bram Thompson, M.A., Barrister-at-Law.

A Reply to Mr. R. V. Sinclair, K.C.

Petitions for Divorce by the Parliament of Canada are now the feature of every Session; and, so far, it looks as if the array at the approaching Session will surpass in volume all previous presentments.

From Manitoba, Saskatchewan and Alberta they have ceased since the Privy Council decided in 1919 that they had the English Law of Divorce as it existed on the 15th of July, 1870. They, and the North-West Territory out of which they were carved, had had that Law all through the years from 1880 by virtue of an enactment of the Parliament of Canada; but they were oblivious of the fact, and were constantly plying Parliament with Petitions until the present writer raised and discussed the question in the C. L. T. (Vol. 37, page 687), that they were governed by the Matrimonial Causes Act 1857, and that, for them, Petitions to Parliament were abrogated.

Most of the Petitions to Parliament now emanate from Ontario, which though it had the Common Law of England, and the Divorce Law of England, as of 1791 at all events, never availed itself of its undoubted right either to adapt the English System or to enact a Divorce Law of its own. Possibly before Confederation it granted individual Divorces by Legislative enactments; but recognizing that the B. N. A. Act terminated its authority to enact a general Divorce Law for itself, it assumed that the same Act put an end to its power to dissolve, in individual cases, the Civil Contract of Marriage; and ever since 1867 it has sought for Divorces by Private Acts passed through the Parliament of Canada.

The Parliament of Canada was acquiescent. It was averse to exercising the authority—I would say it

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was a duty—to enact a general Divorce Law for the Dominion; and so, as a subterfuging substitute, the system of Parliamentary Divorce began, and has flourished ever since.

The Parliament of Canada never made any attempt to enact a general Divorce Law for the Dominion under the powers reposed in it by the B. N. A. Act 1867.

In 1919 after it was found the Western Provinces had the English Divorce Law, Parliament began to tinker with the problem.

The Senate in 1919 introduced a Dominion-wide Divorce Bill which we attacked in the C. L. T. as a deliberate invasion of Provincial rights shrouded in a mass of irrational verbosity about jurisdiction. It promptly went under. In 1921 another Bill appeared. It had none of the objectionable features of the previous Bill, but it related only to Ontario and Prince Edward Island, on which Provinces it proposed to confer "the Law of England as to the dissolution of marriages and the annulment of marriages as that Law existed on the 15th of July, 1870." We assailed that Bill too; first because of the restriction of its area; secondly because it dealt only with a part of the Law of Divorce; and thirdly it gave the two Provinces named only English Law of 1870. Apparently its authors thought this was establishing a uniformity with the Western Provinces. It was as to a date, but as to a date only; for the Western Provinces have *all* the English Law as of that date, whereas the Senate Bill of 1920 purported only to deal with annulment and dissolution. What, with such a Law, was Ontario or Prince Edward Island to do with the immensely larger branch of Divorce Law—that relating to lesser wrongs than adultery, and the remedy for which is not dissolution but Judicial Separation or Divorce *a mensa et thoro*. Were they still to be driven to the Senate and Parliament of Canada for relief by Private Bills against cruelty, desertion, etcetera?

This Bill of 1920 was in fact worse than the one of 1919. It did not tend to uniformity. It multiplied

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anomalies; and we denounced it as a perverse measure. It, too, went under; and since then Parliament has done nothing. Nor, so far as we know, has Ontario done anything itself.

In the C. L. T. of 1919, Vol. 39, p. 253, after we had won the Divorce Law for the West, we assailed the system of Parliamentary Divorce as illegal in every part of it; and in the April issue of 1921, C. L. T., Vol. 41, p. 255, we reproduced the Article for the purpose of getting discussed this problem of high and vital moment to the Canadian people, and with the ultimate object of forcing the Parliament of Canada to enact a Dominion-wide Divorce Law.

By way of criticism we received from Mr. R. V. Sinclair, K.C., Ottawa, the following letter:—

Ottawa, May 23rd, 1921.

The Editor, Canadian Law Times,

Sir,—

I have read with much interest the articles which you have, from time to time, published in the CANADIAN LAW TIMES with reference to Parliamentary Divorce. I need hardly say that in common with the other members of the Bar I would welcome the passing of an Act which would confer jurisdiction in divorce upon the Courts.

I wish to bring to your attention some thoughts which have occurred to me and which seem to militate against the cogency of your reasoning.

Prior to 1857 and during the years that Parliamentary Divorce obtained in England I imagine it is quite clear that a British subject resident in Upper or Lower Canada could, for proper cause, have obtained a valid divorce from the Parliament of the United Kingdom. The jurisdiction of the King and his *Aula Regis* or House of Lords must have extended to Canada.

The abrogation of Parliamentary Divorce in 1857, and the transfer of jurisdiction as to divorce to the Matrimonial and Divorce Court, was not a complete cession of the jurisdiction as to divorce which resided in the King and the House of Lords, but was only a cession of that jurisdiction *qua* the United Kingdom; the jurisdiction still remained in the King and the House of Lords *qua* those Colonies in which there were then no Divorce Courts.

If that is so, is it not possible that as regards Canada that jurisdiction was conferred on the Parliament of Canada (not the Senate) by the British North America Act which being an Act of the Parliament of the United Kingdom was *imbued* with the jurisdiction as to Divorce which *qua* the colonies still remained in the King and House of Lords.

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Do the words in section 91 of the British North America Act conferring power on Parliament to pass laws for the peace, order and good government of Canada limit the power of Parliament to any greater extent than would have been the case had the section simply declared that Parliament might pass laws for Canada in relation to the subjects specifically mentioned in the sub paragraphs? Does not the enactment of all law proceed on the theory that it is for the peace, order and good government of the community?

A law for Canada is one which operates throughout Canada; a Divorce Act so operates.

Admittedly as a general definition we may say that a law is a rule "prescribed"—written anteriorly, and is directed to conditions and conduct which transpire posteriorly, but like all general definitions this statement is necessarily subject to many exceptions. For instance, the Parliament of Canada has power to legislate respecting Patents of Invention, but if the principle above enunciated were strictly applied Parliament could not pass an Act to revive a Patent which had lapsed for non-payment of fees because it would be legislating posteriorly with reference to something which occurred anteriorly.

It seems to me that to assume that the Senate of Canada "pretends to take the place of the House of Lords in the abolished English system," is an assumption which is not warranted by the facts. The Senate does not grant a divorce, it does not exercise any judicial functions and certainly not the "judicial functions of both the old Ecclesiastical Court and of the House of Lords."

The Committee on Divorce of the Senate merely sits to enquire and report; upon its report a Bill is introduced, perhaps passed, perhaps not passed by the Senate. If passed the evidence is considered by a Committee of the House of Commons and by that House which may adopt or reject the Senate Bill. If both Houses adopt the Bill, then Parliament in passing the Bill is exercising the divorce jurisdiction which resided in the King and the House of Lords *qua* the Colonies and which as to Canada was conferred on its Parliament by the British North America Act.

Let me add that I am very strongly impressed by the articles on this question to which I have referred and by the strength of the arguments contained in them, and that in writing the foregoing I am actuated by a desire to provoke discussion upon a subject the correct solution of which is of such paramount importance to the people of this country. If your conclusion that Parliament cannot grant individual divorces is correct it is distressing to think of the unfortunate position of those who having obtained such divorces have remarried and had children. If divorces are to be obtained at all their absolute legality should be incapable of question.

Yours truly,

R. V. SINCLAIR.

This valuable letter was delayed in the publication owing to the Printers' strike in Toronto. But it did

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appear in the August-September issue of C. L. T., Vol. 41, p. 550, when we stated we would not attempt a reply to it for a few months or till our readers all over the Dominion had had an opportunity of discussing and expressing their views concerning the crucial points which it raises.

Few, indeed, have been the opinions we have received; and those which have come forward are from men who to some extent have been committed to the practice of Parliamentary Divorce. They will not sanction disclosure of their names, though we are free to say that they agree, and that their opinion substantially is, as stated by one of them, that "Parliamentary Divorce has not had a legal leg to stand upon since Bram Thompson published his Article in the C. L. T. in May, 1919." (*Vide* C.L.T., Vol. 39, p. 253).

That is very flattering, no doubt, but it does not satisfy the honest seeker for right—for the abolition of a legal absurdity and the rectification of a long standing National crime. It does, however, make the duty of both the Legal Profession in Ontario and the Parliament of Canada emphatic and imperative; and that duty is to see that a Law is instantly enacted to end, so far as the future is concerned, the grotesque fiasco of Parliament Divorce.

But my main purpose now is to reply to Mr. R. V. Sinclair, K.C.

First then as to the claim or suggestion that prior to 1857 a British subject resident in Upper or Lower Canada could for proper cause have obtained a valid Divorce from the Parliament of the United Kingdom: I admit, of course, that in theory, the Imperial Parliament could enact anything it saw fit with regard to any British subject. But, then, we must remember it is controlled by considerations and forces other than absolute might. It is controlled by the fundamental Law of the Constitution itself; and consequently it never passes any legislation with regard to the Civil Right of an individual which is contrary to the general Civil Law, and until that Right itself has been first

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determined according to that Law by a competent Court and by due process of Law. It always followed this course in passing Private or Personal Divorce Acts before 1857. As I pointed out in my Article, Parliament did not divorce people by its Acts. It did not act *ab initio:* it had no original jurisdiction. It heard no evidence. What it did was complementary of what had been already done by the Court. It gave, upon facts already found by the Court, an additional relief or a more complete relief than the Court assumed to give. I will elaborate this statement a little. Before presenting to Parliament a Petition the husband and wife had to be divorced *a menso et thoro* by a Decree of the Ecclesiastical Court. This Decree was the utmost relief granted by that Court, owing to religious compunctions or scruples. While it was a complete separation so as to make a man and wife two entities for every other purpose, it left the marriage bond, or unity effected by it, intact so that the parties could not remarry. All this was quite in keeping with the casuistry of the time. If, however, as part of the proceedings before it, the Ecclesiastical Court found adultery as a fact, then there being no other Court or Forum, the further relief could be procured by presenting a Petition to the King. This further relief was the dissolution of the marriage *in toto* with the right to remarry.

The proceedings and judgment of the Ecclesiastical Court and the record of a verdict and Judgment for damages against the paramour of a wife, were indispensable accompaniments of any Petition to the King.

No British subject domiciled out of the United Kingdom could have availed himself of this system as a matter of right.

If a British subject in either Upper or Lower Canada could have complied substantially with the indispensables of this system—could have shown a Divorce *a mensa et thoro* founded upon a judicially found fact of adultery by the Court of his domicile—

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and could have shown an incapacity in his own Legislature or the absence of a Court to grant the additional relief or right of remarriage, he might have secured a Private Act of the Imperial Parliament. But he could not have secured it otherwise: and as compliance with these indispensable preliminaries was impossible owing to the apathy or neglect of the Legislatures of Upper and Lower Canada to enact a Divorce Law, he could not have secured it at all; for the Imperial Parliament could not do, or be expected to do, for a Canadian what it has never done, and always refused to do, for a citizen of the United Kingdom.

The Parliament of the United Kingdom never did, and without changing the Law or making a Law for the purpose it could not, divorce a husband and wife *a vinculo matrimonii* unless they had been previously divorced *a mensa et thoro* by the Civil or Ecclesiastical Court; and the fact—if it were a fact—that in Upper or Lower Canada there was no Law by which a domiciled citizen therein could obtain such last-named divorce, instead of being a reason for the Imperial Parliament to exert its superior legislative authority to dissolve a marriage contract by statute, would present the most formidable reasons for non-intervention, as the natural or inevitable conclusion from the non-existence of a local Law, in view of the power of the local legislature to enact a Law, would be that the citizens or people of the colony regarded Divorce Law as *contra bonos mores*. The Imperial Parliament would not interfere; and, unless it discarded the constitutional restraints, it could not interfere. It was the obtuseness of Upper Canada in not recognizing that it had the Common Law (which included Divorce Law) and its inconsiderate obstinacy in refusing either to administer it or adapt it to the needs of the people that created the anomalous position in which Ontario stands to-day and has stood since Confederation.

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The Lawyers of Ontario failed to separate the conception of Law from the conception of Jurisdiction. They acted throughout on the assumption that a Law dispensed by Ecclesiastical Courts was necessarily Common Law, and not part of the Civil Law of England as Divorce Law was ever after the Reformation. That Law, in spite of the desuetude into which it fell, is still Law in Ontario; and all that Upper Canada had to do was, or that Ontario has even now to do is, to constitute a Court to dispense it.

Precisely the same jumble of ideas imported into the West by Ontario men kept the West out of its Divorce Law for nearly 40 years; and they were peeved rather than pleased when the Privy Council decision in *Walker* v. *Walker* and *Board* v. *Board* dispelled the illusion, and relegated the West to its Rights.

I am convinced the Imperial Parliament would not have passed a private Divorce Act for a citizen of Canada at any time since 1791.

But this does not quite get rid of Mr. Sinclair. His second suggestion is that the Matrimonial Causes Act 1857 only affected the Divorce jurisdiction of the King and House of Lords *qua* the United Kingdom, leaving that jurisdiction intact, "*qua* those Colonies in which there was then no Divorce Court." Assuming this, he suggests that this "Jurisdiction was conferred on the Parliament of Canada (not the Senate) by the B. N. A. Act, which being an Act of the Parliament of the United Kingdom was *imbued* with the jurisdiction as to Divorce which *qua* the Colonies still remained in the King and House of Lords."

I am sorry, indeed, to disturb so ingenious an argument as this surely is: and I am not certain whether Mr. Sinclair propounded it to test my skill in refuting it, or to display the utter baselessness of the case which I have in my published Articles already demolished.

This idea of the Parliament of Canada being "imbued" with the authority of the Imperial Parlia-

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ment for Divorce Law or any other Law surpasses anything I have ever yet seen advanced. On the same hypothesis why is not the Dominion Parliament "imbued" with power or authority to amend its own constitution; to amend the B. N. A. Act itself; to enact the Fair Prices Act which the Privy Council the other day held to be *ultra vires,* though it is an express power of Parliament to regulate Trade and Commerce? Because the power to enact any of these is not conferred specifically upon the Parliament of Canada by the B. N. A. Act which created it. Nothing can be imputed and nothing can be inferred or implied which is not clearly within the compass of the powers set out in the Act. That, in fact, is the meaning of a written constitution. It is as rigid as adamant, and it cannot be made flexible by the process of "imbuing" it with something which is not inherent in it.

When the Imperial Parliament abandons its supremacy and declares Canada a Sovereign Nation then, no doubt, the Parliament of Canada will be "imbued" with the authority and attributes of the Imperial Parliament, including the control of the King's Prerogatives. Till then it is subordinate in the sense that it has a superior, though it is free within the orbit of its express powers; but these must be construed by the letter of the B. N. A. Act and not by inference or any rule of convenience.

As pointed out in my Articles, the Private Divorce Acts passed in England prior to 1857 were not passed in exercise of any autocratic Sovereign power reposed either in the King or in Parliament. They were emphatically part of a judicial process relating to Civil Rights of Citizens under the Common Law of England.

The Common Law of England, as well as the Roman Law whence many of its vital ingredients were imported, regarded marriage as a Civil Contract, and for its breach, by adultery, the remedy provided was its dissolution by an absolute divorce. It was called in

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both systems divorce *a vinculo matrimonii.* The terminology shows the source of the conception.

The Ecclesiastical Courts which sprang up in England in consequence of the assertive dominancy of the Church between the Norman Conquest and the Reformation arrogated to themselves jurisdiction over a vast range of subjects involving Civil Rights, which are now once more controlled by Civil Courts. Among these subjects were the rights and obligations of the marriage contract, and the remedies for its breach. But the Ecclesiastical Courts, instead of dispensing the Common Law with the remedy of dissolution, invented or rehabilitated the notion that marriage, being a religious sacrament or rite, a man and woman joined together by the Church could not again be disunited; and they applied the remedy introduced into the Canon Law by Pope Gregory IX. This was called divorce *a mensa et thoro;* and however flagrant the breach of the marriage obligation may have been, the Ecclesiastical Courts never exceeded this limited decree. Though it was a complete separation for all purposes of the husband and wife, it left intact the sacred knot tied by the Church, and this precluded a second marriage.

England it should be said never admitted that this was Canon Law or indeed that Canon Law, as such, ever had any operation in matters of purely Civil Right in that country. It was claimed that divorce *a mensa et thoro* was part of the Common Law for lesser wrongs than adultery, but that it was not the remedy—the complete remedy—provided by the Common Law for violations of the marriage contract by adultery. In many cases the lesser remedy sufficed; and where the full relief or remedy was required it was sought through another tribunal.

Whatever may be said about the mixing up of the Common and Canon Law, it is certain that before the Reformation the Pope himself as head of the Church dispensed, when he saw fit, with the restrictions and prohibitions of the law administered by the Ecclesi-

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astical Courts, and he gave the parties the right to re-marry again, in spite of the Court's decree.

The Reformation, however, changed everything. *Inter alia* it restored the Common Law and, if it ever existed, abolished Canon Law with regard to Civil Rights. It made the King head on earth of the Church of England and abrogated the Pope's dispensing power. Parliament, however, unfortunately, allowed the Ecclesiastical Courts to remain though they were continually for years being divested of one jurisdiction after another. They were not, in fact, after the Reformation, Church Courts at all, but Civil and Criminal Courts with many varieties of powers, and only incidentally dispensers of Canon Law strictly so called.

Though the nature of their jurisdiction had changed and they administered the restored or metamorphosed Common Law, they went no farther with divorce decrees after the Reformation than they had previously done when the Church was nearly all-dominant. They refused to dissolve the marriage contract and stopped absolutely at divorce *a mensa et thoro*.

These decrees undoubtedly left unapplied part of the remedy provided by the Common Law for breaches by adultery of the Civil Contract of marriage. To remedy this wrong, parties aggrieved and who wanted the complete remedy of dissolution had, as there was no other prescribed forum, recourse to the King, who was both the Fountain of Justice and the head on earth of the Church of England. But they had not the right of direct recourse to the King, in the first instance. As far as they would go, the Courts had to dispense the Law; and before anyone could petition the King he had to be divorced *a mensa et thoro* by the Ecclesiastical Court which had to find as a judicial act in the course of the proceedings before itself all the essential facts of adultery or other wrong upon which a Petition might be based for the full remedy or absolute Decree of Divorce *a vinculo matrimonii*.

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In the early years after the Reformation the King in virtue of some such authority as the Pope had pretended to exercise, or, what is far more probable, in exercise of his autocratic law-making Prerogative, which had not then been completely absorbed,—did grant the further relief of dissolution by Royal Proclamations. But as part of the Constitutional development—the transfer from the King to Parliament of everything in the nature of autocratic power — the Royal Proclamations soon ceased, and the decree of the Sovereign in reference to Petitions by divorced people for a right to remarry according to the Common Law of England came to be expressed in Private Acts of Parliament.

The Petitions, I should say, were presented to the King in Council. The Council adjudicated upon them on the strength of the facts already judicially found by the Ecclesiastical Court. If satisfied, they were marked *fiat justitia;* and thence they passed to the House of Lords which is at once the Court of the King, a constituent branch of Parliament, and the highest Court of Judicature in the United Kingdom. The House of Lords again adjudicated upon the Petitions; and, if in order, a Private Bill was introduced and carried through the House of Lords conceding to the subject the redress or remedy sought. The Bill passed to the Commons and became Law in the usual way.

This became a stereotyped part of the procedure for dissolution of marriages before 1857.

It is absolutely clear therefore that Private Divorce Acts were not in England, as they are in Canada, autocratic enactments of Parliament. In England they imparted a right under the Common Law withheld or denied to the Citizen of the Country through a defect in the system of judicial administration.

Now how could this system, so peculiarly indigenous to England, become vested in the Parliament of Canada; or how could the B. N. A. Act be "imbued," as Mr. Sinclair suggests, with this system so as to transmit it to the Parliament of Canada, and more

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particularly as the system itself had been abrogated in England ten years before the Parliament of Canada was created?

It is an impossibility. There is no analogy between the two Countries or what their respective Parliaments did or what the Parliament of Canada still pretends to do. Canada has no State Church of which the King is head, if that is a factor, which I think it is not. Canada has no Divorce Law—that is no Law which the Parliament of Canada could dispense by statute even if it had the power. England had a Divorce Law and Courts to administer it. The Imperial Parliament only acted as an auxiliary of the English Courts in conceding by statute a relief or remedy wrongly or whimsically withheld by the Court. It did not make Law for the nonce; but it applied or administered existent Law. The Parliament of Canada dispenses altogether with the Courts; transforms the Senate into a judicial tribunal; and dissolves marriage contracts *ab initio* and *in toto*, though it has neither Law nor precedent to justify its act.

The Parliament of Canada acts the part of an arrant autocrat. It acts contrary to *Magna Charta* itself by despoiling people of their Civil Rights without either a Judgment of a Court or any "Law of the Land."

The Parliament of Canada could not even enact a valid Law to enable it to exert such an autocratic power as it, for years, has exerted contrary to every fundamental of the constitution.

Besides this the theory of "imbuing" propounded by Mr. Sinclair is confronted with another difficulty. Section 18 of the B. N. A. Act 1867, restricts the privileges, immunities and powers of the Senate and House of Commons in Canada to those "held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom."

The House of Commons of the U. K. could not have heard a Petition for a Private Divorce Bill, nor

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could it have introduced or considered such a Bill, unless it had first passed through the House of Lords. That was a Privilege of the House of Lords; and the Senate, though it acts as if it were, surely is not the equivalent of the House of Lords. It has no function judicial or otherwise, except as a part of the Legislative machine, limited however to the functions and powers of the House of Commons in England.

Having stated all this I think, with all deference to Mr. Sinclair, I am entitled to repeat that in my opinion the Senate of Canada does pretend to take the place in Canada of the House of Lords as well as of the abolished Ecclesiastical Court in England. It does more; it takes the place of the Privy Council and even of the King. It does not, I admit, grant divorces. Nor did the House of Lords grant divorces. But it assumes the right to discharge judicial functions formerly exercised both by the Ecclesiastical Court, and by the Judicial Committee of the Privy Council, and by the House of Lords, though it has no inherent or statutory judicial function of its own. It does what neither the House of Commons in England nor the members of it could do. It hears, for instance, evidence on the controverted facts of Divorce Petitions and makes findings of fact thereon just as did the Ecclesiastical Courts, and just as the Judicial Committee of the Privy Council and the House of Lords made findings of fact on the written petitions, records, and evidence submitted to them. These findings in each case are judicial acts, for they are essential preludes to the legal redress sought for by the Petitioners. The form of the finding—whether as a verdict, a judgment or a report—does not alter its real nature, nor does the fact that the Senate of Canada agglomerating the functions together of the three tribunals discharges them *per saltum* as one act of superlative legislative gymnastics.

It is as well to add that these Private Divorce Acts could not be passed by the Parliament of Canada by virtue of any Prerogative Sovereign Right. They are

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not Law in any sense. They have no Law behind or before them. They were and are autocratic decrees determining the Civil Rights of individual parties in relation to violated marriage contracts. This question has been discussed in my original article.

The Sovereign Prerogative of the King is limited, so far as the Parliament of Canada is concerned, to the legislative authority of Parliament, and the Parliament of Canada has no authority to enact anything but "laws for the peace, order and good government of Canada." Among these Laws would be a Dominion-wide Divorce Law. It has no authority to enact private or civil rights, without and regardless of Law, even if they are rights arising out of marriage contracts.

If there is such a prerogative right anywhere in Canada it is in the Provincial Legislatures which have exclusive authority over the Laws relating to Civil Right. The Parliament of Canada by enacting a general Divorce Law might over-ride or exclude this right of the Provincial Legislatures to dissolve marriage contracts made and entered into under the authority of their enactments. But until the Parliament of Canada has done this, the right, I submit, is with the Provincial Legislatures rather than with the Parliament of Canada. Even in the Prairie Provinces the people wanting divorces were told all they could do was to go to Ottawa. What a shame! All this was changed as I have stated; and these Provinces have now the English Matrimonial Causes Act 1857 with its amendments up to 1870; and they must get their Divorces under the Law there prescribed until it is changed by the Parliament of Canada.

It was never intended, or perhaps thought, that the Parliament of Canada in evading its duty to enact a general Divorce Law would have resorted to the absurd and illegal scheme which it has carried out. But whether it was as a warning or as a safeguard it is a fact which has recently come to my knowledge, that up to the time of the Governor-Generalship of

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Lord Dufferin, the Warrant of Authority or Royal Letter of Instructions to all the Governors-General contained an express prohibition against sanctioning Private Divorce Bills! When and how it ceased perhaps some of the Government authorities at Ottawa could tell.

It is time indeed for the Parliament of Canada to shake off the notion that it is an Autocrat; and it is time too for Ontario to push it rudely off the pedestal and insist on the rights of the people being safeguarded by an adequate Law.

BRAM THOMPSON.

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PURCHASE FOR VALUE AND ESTOPPEL.

By Henry W. Ballantine.*

1. Various Grounds of Defeasance of Legal and Equitable Titles.

It is a fundamental principle that an owner cannot be divested of his property without his consent, or by operation of the law.[1] As Kent says:[2]

"Although it may be true, as an absolute principle, that a derivative title cannot be better than that from which it is derived, yet there are many necessary exceptions to the operation of this principle."

These exceptions are based on the necessities and policy of commerce in giving effect to the usual evidence of title, upon estoppel, upon the relation of equitable and legal rights, upon statutory provisions and possibly other grounds. It may be of interest to take a comprehensive view of the grounds and policy of those exceptional cases where the seller has power to give what he himself did not have.

At common law sales in market overt gave title to stolen goods. The doctrine of sale in market overt, which is perpetuated in England by the Sale of Goods Act, for the protection of the buyers of goods in shops where such goods are openly sold, has not been adopted

* Editor's Note.—The author of this and other legal expositions of highly complex character, constantly confronting the practitioner, is Professor of Law in the University of Minnesota. This article is copyright, but the author has kindly consented to its publication in the Canadian Law Times. It deals with the problem from the English, American and Canadian viewpoints and cites authorities for each in a thorough and masterly manner.—B. T.

[1] *Saltus* v. *Everett* (1838), 20 Wend. (N. Y.) 267, 270, 32 Am. Dec. 541; *Ventress* v. *Smith* (1836), 10 Pet. (U.S.) 161, 175, 9 L. Ed. 382; *Baker* v. *Taylor* (1893), 54 Minn. 71, 55 N. W. 823; *Snell* v. *Snell* (1893), 54 Minn. 285, 55 N. W. 1131; *Root* v. *French* (1835), 13 Wend. (N.Y.) 570, 572, 28 Am. Dec. 482; *Williams* v. *Merle* (1833), 11 Wend. (N.Y.) 80, 25 Am. Dec. 604; *Cunday* v. *Lindsay* (1878), 3 A. C. 459, 464; 2 Kent, Comm. 323, 324; Williston, Sales, sec. 311, 406; 2 Tiffany, Real Property, 2nd Ed., sec. 566.

[2] See Kent, C. J., *Jackson* v. *Henry* (1813), 10 Johns. (N.Y.) 185.

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in America.[3] It is interesting to notice it, however, as an illustration of how far the law may go in protecting *bona fide* purchasers and treating possession in a public market as evidence of title, conferring the power of sale. It would be entirely conceivable that the law should recognize purchasers who buy on the faith of the possession of a bailee, finder or thief of any sort of personal property commonly dealt in.

The first and most striking class of exceptions to the general rule of *caveat emptor* includes currency and negotiable instruments. The negotiability of money and commercial paper is given by the policy of the law and by the consent of those who put obligations in negotiable form, to facilitate the circulation of this species of property, which is intended to pass freely from hand to hand.[4]

A second large and important class of exceptions includes those cases where the true owner is estopped to assert his title. Estoppel arises where the owner has, by his own voluntary act, conferred upon the person who makes the sale either the apparent title or *indicia* of property, or the apparent power of disposal as an agent.[5] The "equity" of the purchaser is based on the principle formulated by Justice Ashurst, in 1787, in the celebrated case of *Lickbarrow* v. *Mason*.[6]

"We may lay it down as a broad general principle that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."[7]

As Ewart points out in his noteworthy treatise on estoppel, a man may be estopped by the misrepresenta-

[3] Williston, Sales, sec. 347; Jones, Position of a Bona Fide Purchaser of Goods 48: *Hogan* v. *Atlantic El. Co.* (1896), 66 Minn. 344, 346, 69 N. W. 1.

[4] *Miller* v. *Race* (1758), 1 Burr. 452, 1 Smith L. Cas. 12th ed., 525; *Voss* v. *Chamberlain* (1908), 139 Ia. 569, 575, 117 N. W. 269.

[5] *Saltus* v. *Everett* (1838), 20 Wend. (N.Y.) 267, 270, 32 Am. Dec. 541; Williston, Sales, sec. 312; Ewart, Estoppel 238.

[6] (1787), 2 Durn. & E. 63, 1 Smith L. Cas. 12th ed., 726, 734, 769.

[7] See *Rimmer* v. *Webster*, [1902] 2 Ch. 163, 169, 173; *Farquharson* v. *King*, [1902] A. C. 325, 336, 342; *Voss* v. *Chamberlain* (1908), 139 Ia. 569, 579, 117 N. W. 269.

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tion of another person if he has assisted it by furnishing an opportunity for the fraud.[8] The true owner, although not a party to the sale, yet may be bound by it if he has assisted in creating a deceptive situation, which is relied upon by the subsequent buyer. Such is the case where a seller is allowed to remain in possession of goods after a sale, and is thereby given a false and deceptive appearance of ownership.[9]

Bills of lading, certificates of stock, and warehouse receipts, are often spoken of as *quasi-negotiable* instruments. In *Ammon* v. *Gamble-Robinson Co.*,[10] it is said that bills of lading and warehouse receipts have not been put by our statute on the footing of bills of exchange, but the transfer and delivery of these symbols of property has been made the equivalent of a transfer and delivery of the property itself. In truth, however, these documents of title are not merely symbols of the tangible property, but of the title, and create an estoppel in favour of the innocent purchaser in cases where he buys the property in good faith in reliance on the ostensible title of the holder.[11]

The common law on this subject is being extended by statute to make the customary evidences of title such as bills of lading transferable in the same way and to the same extent as bills of exchange. Legislation has been proposed by the Commissioners on Uniform State Laws, and adopted in many states, which aims to make it safe to give full faith and credit to bills of lading and similar documents, so that banks and merchants may deal in them freely. A bill of lading is now fully negotiable by the Minnesota Bills of Lading Act and by the Federal Bills of Lading Act. There are inconsistent provisions with reference to the extent of negotiability of warehouse receipts, bills of lading, and

[8] Ewart, Estoppel 20, 21, 238; 18 Law Quarterly Review 165.

[9] *Flanagan* v. *Pommeroy* (1902), 85 Minn. 264, 88 N. W. 761.

[10] (1910), 111 Minn. 452, 127 N. W. 448. But see Minn. G. S. 1917 secs. 4434-37, 38.

[11] *Shattuck* v. *American Cement Co.* (1903), 205 Pa. St. 197, 54 Atl. 785. See Negus, Negotiability of Bills of Lading, 37 Law Quar. Rev. 442, 456.

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stock certificates in the various uniform state statutes, which the Commissioners on Uniform State Laws have recommended for enactment.

In the Sales Act, and Warehouse Receipts Act, it is provided that negotiation may be made by any one entrusted with a document in deliverable form. On the other hand, by the Bills of Lading Act, and the Stock Transfer Act, a purchaser for value of an order bill of lading, or a stock certificate, even from a finder or thief, is protected, provided the instrument is made or endorsed to the holder, or endorsed in blank.[12]

The commissioners evidently were prepared to go further in promoting the negotiability of mercantile documents as representatives of title in these later acts than in the earlier. It has been recommended by a committee that these statutes be made harmonious, so that these documents, running to order or bearer, may be negotiated by any person in possession with apparent title, however such possession may have been acquired, whether by theft or finding, as in case of bills of exchange. It is a great point of policy that in all mercantile transactions the circulation and transfer of property be made as easy, safe, and certain as possible, so that men may be protected in buying and in lending money in reliance upon the customary *indicia* of title.[13]

A third class of cases of *bona fide* purchase is where the true owner's right is equitable, and the trustee or holder of the legal title is enabled to sell to a *bona fide* purchaser for value free and clear of the equity. Thus, if the owner has been led to part with his property with his consent, but under circumstances which would make that consent revocable, as where it is obtained by fraud or mutual mistake, if the property passes into the hands of a *bona fide* purchaser for value, the defrauded owner cannot follow his goods into the hands of the buyer. What is the reason? It

[12] See 1 Minnesota Law Review 68; 16 Ill. L. R. 233.

[13] Buller, J., in *Lickbarrow* v. *Mason* (1787). 2 Durn. & E. 63. 6 East 20, 5 Durn. & E. 683, 1 Smith L. Cas., 12th ed., 726, 769.

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may possibly be explained by the nature of equitable rights and remedies, or it may rest on grounds of public policy and estoppel, namely, that if the owner has given an apparent title to the fraudulent purchaser, he is precluded from asserting his claim against the innocent purchaser, wha has relied upon the apparent ownership of the fraudulent party.[14]

As Savage, C.J., says, in *Root* v. *French*:[15]

"The *bona fide* purchaser is justified in considering the fraudulent vendee the true owner . . . He is protected in doing so upon the principle just stated, that when one of two innocent persons must suffer from the fraud of a third, he shall suffer who by his indiscretion has enabled such third person to commit the fraud. A contrary principle would endanger the security of commercial transactions, and destroy that confidence upon which what is called the usual course of trade materially rests."[16]

If the true principle here is estoppel and giving effect to the outward evidence of title, then a rescission of the voidable sale by notice to the buyer, without recovery of the possession, would not so far revest the title as to prevent a sale to a *bona fide* purchaser in reliance on the apparent title of the fraudulent buyer.

It is contended by Ewart that in practically all cases the rights of the innocent purchaser as against the true owner are really acquired on principles of estoppel. He argues that both negotiability and also the cutting off of equities by transfer of the legal title must be explained and developed along lines of responsibility for ostensible ownership in a third party or "assisted misrepresentation."

A fourth class of exceptions to the general rule covers the defeasance of title under the recording acts.

[14] *Saltus* v. *Everett* (1838), 20 Wend. (N.Y.) 267; *Root* v. *French* (1835), 13 Wend. (N.Y.) 570, Jones, Position of a Bona Fide Purchaser of Goods Improperly Obtained 62, 63.

[15] (1835), 13 Wend. (N.Y.) 570.

[16] See also *Moore* v. *Moore* (1887), 112 Ind. 149, 152, 13 N. E. 673; *Trustees of Brookhaven* v. *Smith* (1890), 118 N. Y. 634, 640, 23 N. E. 1002; Ewart, Estoppel, 302, ff., 423; Williston, Sales, sec. 406.

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The system of recording conveyances by which the title may be affected is especially designed for the benefit and protection of parties dealing in real property. The leading object is to provide evidence of title, accessible to all, upon which one may rely in making a purchase when he has no knowledge of anything to put him on inquiry.[17] Purchases are commonly made with little other inquiry than that which the records and the occupancy may suggest.

The safe transaction of business and the security of titles in these different classes of cases may depend on the protection of the *bona fide* purchaser who acquires title unconscious of latent defects and without any practical means of knowing them. If latent equities could be asserted no matter through what a course of successive alienations the title had passed, the inconvenience to business would be serious indeed. The law is anxious to quiet the title of the *bona fide* purchaser against secret defects and latent equities if there is any just ground to do so.[18] The doctrine of *bona fide* purchase cannot be regarded as based upon self-evident principles of natural justice. It is the expression of various more or less clearly perceived notions of expediency, justice and business policy. What these are needs to be more clearly understood in connection with various types of wrongful transfer.[19]

We shall take up first transfers of stock as typical of the rights of the purchaser of documents of title; second the assignment of choses in action, whether or not free and clear of latent equities; and third wrongful transfers by trustees and whether the doctrine of *bona fide* purchase should extend to one who acquires only an equitable title.

[17] *Merchant* v. *Woods* (1881), 27 Minn. 396, 7 N. W. 826, Wade, Law of Notice, sec. 96.

[18] See *Jackson* v. *Henry* (1813), 10 Johns. (N.Y.) 185.

[19] See Cook, Alienability of Choses in Action, 30 Harv. L. Rev. 476, 477. See also Williston, 31 Harv. L. Rev. 829, 930.

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II. Bona Fide Purchase of Stock Certificates.

It is said in the case of *Axford* v. *Western Syndicate Investment Co.*,[20] that:

"Stock certificates are not negotiable instruments. They do not run to bearer or to the order of the person to whom they are given. They simply declare that the person named in the certificate is entitled to a certain number of shares of stock. . . An assignment or transfer thereof is necessarily subject to inherent infirmities and to all rights and liabilities attached thereto at the time of the assignment."

It is true that at common law certificates of stock are not negotiable paper in the sense that a title transferred by a thief or finder to a *bona fide* purchaser cannot be questioned.[21] But if one could never buy a share of stock without ascertaining at his peril whether there was not someone with a secret equitable interest in it, stock purchases would be perilous indeed.

As Cook says in his work on corporations:[22]

"To such an extent has the law of estoppel been applied to protect a *bona fide* purchaser of stock that, excepting in cases of certificates transferred in blank and lost or stolen without negligence on the part of the owner, a *bona fide* purchaser is protected now in almost every instance when he would be protected if he were purchasing a promissory note or other negotiable instrument."[23]. Estoppel may protect the purchaser not only against rights of previous holders, but against claims of the corporation itself.

[20] (1918), 141 Minn. 412, 423, 170 N. W. 587, 591.

[21] *Bangor Electric Light Co.* v. *Robinson* (1892), 52 Fed. 520; *Barstow* v. *City Trust Co.* (1914), 216 Mass. 330, 103 N. E. 911; *East Birmingham Land Co.* v. *Dennis* (1888), 85 Ala. 565, *Levine* v. *Wilson* (1891), 90 Cal. 126, 27 Pac. 33; *Anderson* v. *Nicholas* (1864), 28 N. Y. 600; *Weaver* v. *Barden* (1872), 49 N. Y. 286.

[22] Cook, Corporations, sec. 416.

[23] See also *Cincinnati, etc., Ry.* v. *Citizens National Bank* (1897), 56 Ohio St. 351, 47 N. E. 249; *Omara* v. *Newcomb* (1906), 38 Colo. 275, 88 Pac. 167; *Shattuck* v. *American Cement Co.* (1903), 205 Pa. St. 197, 54 Atl. 785, 97 A. S. 735; Machen, Corporations, sec. 842, 902; Fletcher, Cyc. Corporations, sec. 3846, 3847; Ewart, Estoppel, 342, 347.

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If one holds stock in trust, a purchaser in good faith will be protected, although the transferor is guilty of a breach of trust.[24]

A transferee of a certificate of stock in good faith thus takes it free of any latent equities in favour of third parties. In England, however, a man may transfer his shares in a corporation to a trustee and entrust him with the certificates, and yet enforce his equitable title against a purchaser or mortgagee of the trustee who has not obtained the legal title.[25]

If an owner of stock allows another to appear to be owner or to have full power of disposition, an innocent purchaser will have a superior equity. One who, for purposes of his own, places the legal title to property in another must take the risk of loss that may result from his dealing with innocent third persons as owner. Where, however, an agent or servant simply has access to document endorsed in blank, remaining in the possession of the owner, and the owner has not entrusted him with the document, he is not considered to have done enough to be estopped against a purchaser in good faith.[26] But if possession of the *indicia* of title be entrusted to an agent or pledgee for one purpose and he uses them for another, the ground of estoppel is present and the estoppel arises. It is held that the sufferer should be the one who has created the means of doing the wrong.[27] It would be contrary to justice and business convenience to permit the owner

[24] *Winter* v. *Montgomery G. L. Co.* (1889), 89 Ala. 544, 7 So. 773; *Deuber Watch Case Manufacturing Co.* v. *Daugherty* (1900), 62 Ohio St. 589, 57 N. E. 455; 14 C. J. 785; Ames Cases on Trusts 300. See also *Wolf* v. *Trust & Savings Bank* (1914), 214 Fed. 761; *Iron Stone Ditch Co.* v. *Equitable S. Co.* (1912), 52 Colo. 268, 273, 121 Pac. 174. Compare, however, *Colonial Bank* v. *Cady* (1890), L. R. 15 A. C. 267; *Ireland* v. *Hart*, [1902] 1 Ch. 522; *Shropshire, etc., R. Co.* v. *The Queen* (1875), L. R. 7 H. of L. 496.

[25] *Shropshire, etc., R. Co.* v. *The Queen* (1875), L. R. 7 H. L. 496.

[26] *Knox* v. *Eden Musee Co.* (1896), 148 N. Y. 441, 454, 31 L. R. A. 779, 42 N. E. 988; *Farmers' Bank* v. *Diebold Safe Co.* (1902), 66 Ohio St. 367, 64 N. E. 518, 58 L. R. A. 620.

[27] *National Safe Deposit Co.* v. *Hibbs* (1913), 229 U. S. 391, 57 1 Ed. 1241. 33 S. C. R. 818; *O'Neil* v. *Wolcott Mining Co.* (1909), 174 Fed. 527, 27 L. R. A. (N.S.) 200; Fletcher, Cyc. Corporations, secs. 3781, 3853.

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to assert his title against an innocent purchaser from one whom he has clothed with all the *indicia* of ownership and power of disposition.[28] The principles which underlie equitable estoppel place the loss on him whose misplaced confidence has made the wrong possible.

Thus, in the leading case of *McNeil* v. *Tenth National Bank*,[29] it is held that one who indorsed in blank a certificate of stock to his broker as a margin on account of advances made, was estopped to set up his title against one to whom the broker had wrongfully pledged the stock. If the owner entrusts to another, not merely the possession of the property but also the written evidence of title, this is sufficient to preclude him from reclaiming the property in case of its unauthorized disposition.[30]

In *Schumacker* v. *Greene-Cananea Copper Co.*,[31] the plaintiff, owner of a stock certificate, endorsed it in blank to a reputable going bank as pledge for a loan. The cashier stole it and sold it to a *bona fide* purchaser. It was held that the owner was not estopped to assert his title against the innocent purchaser. It is admitted that if the sale was the act of the bank, the defendant should prevail, as the plaintiff was the one who trusted the bank and put in its hands the power of inflicting the loss. But it was held that the cashier's act in abstracting and selling the certificate was not the act of the pledgee bank, but of the officer individually. In view of the fact that there was authority in the cashier to sell in case of default, and that the certificate was endorsed in blank for that purpose, it is somewhat hard to understand why the act of the cashier was not the act of the bank, and why pledging a certificate in blank to a bank should not raise an estoppel as much as pledging it to a broker by way of a margin.[32]

[28] *McNeil* v. *Tenth National Bank* (1871), 46 N. Y. 325. 7 Am. Rep. 341; *National City Bank* v. *Wagner* (1914), 216 Fed. 473.

[29] (1871), 46 N. Y. 325.

[30] 14 C. J. 783, 786.

[31] (1912), 117 Minn. 124, 134 N. W. 510, 38 L. R. A. (N.S.) 180.

[32] See *McCarthy* v. *Crawford* (1909), 238 Ill. 38, 86 N. E. 750, 29 L. R. A. (N.S.) 252, 254.

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A case presenting a problem similar to that arising under forged transfers of stock is found in *Dixon* v. *Caldwell*.[32] One Caldwell was the owner of a military bounty land warrant for 160 acres, issued by the Government. It was misappropriated, and without the knowledge or consent of Caldwell, was sold and assigned to Dixon by some person who forged his name thereto. Dixon purchased in good faith and in ignorance that the assignment was forged, located the warrant and obtained a patent to the land from the Government. Caldwell then sought to charge Dixon as a constructive trustee for the lands so located.

It was held that the defendant could hold the lands as a *bona fide* purchaser for value. Although the true owner of the warrant would have had an equitable claim upon the land upon which the location was made before the defendant clothed himself with the legal title, yet when Dixon obtained the legal title, unaffected with notice and for a valuable consideration, Caldwell it was declared could no longer follow his property. Dixon was liable as a converter for the value of the warrant, but he could not be required to surrender the legal title of the land or account for the proceeds of the land which he had obtained in return for the warrant.

This decision, although it is not criticized by the text writers, seems clearly erroneous. In the case of a forged indorsement, the warrant belongs not to the purchaser but to him whose name was forged. The purchaser is guilty of conversion, though a morally innocent one. When he presented the warrant and "collected" it from the Government by securing a patent to land, he became a constructive trustee, since he obtained the title by the use of another's property and in exchange for it. If the Government were a private person, the warrant could still be enforced by the true owner in spite of payment or patent to one who was not a lawful owner, and had no authority from

[32] (1864), 15 Oh. St. 412.

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him to receive it. The fact that Dixon paid away his money to a swindler without title gives him no "equity" as a purchaser for value either to the warrant or its proceeds. Caldwell's position was that of one holding a contract right against the Government, and Dixon obtained title to the land by an innocent misrepresentation that he was the assignee and holder of this contract right which belonged in law and equity to Caldwell. An innocent purchaser from Dixon, however, would doubtless take title to the land free and clear.

Pomeroy lays it down in his work on Equity Jurisprudence,[34] that even where a transfer of a certificate of stock is accomplished solely by the forgery of the owner's name to the indorsement and power of attorney, and the certificate thus comes into the hands of a purchaser for valuable consideration and without notice, and he registers himself as a stockholder by surrendering the original certificate to the corporation and receiving a new one in his own name, the purchaser would be protected. He asserts that the assignee would under these circumstances obtain a complete precedence over the original owner; he would not be liable to the owner for the shares nor for their value; the owner's remedy if it exists at all, is against the corporation alone, to compel it either to issue new shares or to pay the value of the old ones. This remarkable statement is, however, not supported by the authorities cited by Mr. Pomeroy, and seems clearly erroneous. It is only where one purchases stock from one who is registered on the company's books as legal owner that he prevails against the company by estoppel.

In general, the owner of shares cannot be deprived of his title by forgery, even though his certificates pass thereby into the hands of an innocent purchaser.[35] No title passes under forged indorsement whether the forgery is by a finder, a thief, or by bailee to whom

[34] Sec. 712.
[35] 2 Cook, Corporations, secs. 358, 365.

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the certificate was entrusted.[36] No estoppel is created in favour of the person presenting the forged transfer, by the issue to him of a new certificate.[37] If the corporation has registered a transferee whose title is based on a forgery, it may cancel his stock. A forgery can confer no power and transfer no rights.[38] As Cook says:

"The transferee who first obtains the registry has no rights except against his transferor. But all subsequent innocent purchasers are protected. They cannot be compelled to give up their stock, either to the corporation or to the original owner."[39]

The company is estopped from denying the title of a purchaser by the issue of a share certificate to the transferor which is a representation made for the purpose of being acted upon. The estoppel is not raised in favour of the person to whom the certificate was issued, but only for the transferee from such person.[40] One who surrenders a certificate bearing a forged indorsement and obtains a new certificate in ignorance of the forgery is liable to the corporation upon an implied warranty of the genuineness of the signature.[41]

III. Assignment of Choses in Action and Latent Equities.

There is much support for the view that the doctrine of purchase for value without notice has no

[36] *National City Bank* v. *Wagner* (1914), 216 Fed. 473; *Crocker* v. *Old Colony R. Co.* (1884), 137 Mass. 417; 6 Fletcher, Cyc. Corporations. sec. 3834.

[37] *Hamilton* v. *Central Ohio R. Co.* (1876), 44 Md. 551; *Brown* v. *Howard Fire Ins. Co.* (1875), 42 Md. 384; 20 Am. Rep. 90; *Houston* v. *VanAlstyne* (1882), 56 Texas 439. See note 21 Colum. L. Rev. 576.

[38] *Citizens National Bank* v. *State* (1913), 179 Ind. 621, 631, 635, 45 L. R. A. (N.S.) 1075, 1077, 1082.

[39] 2 Cook Corporations 6th ed., sec. 370, 401.

[40] Machen, Corporations, secs. 914, 916, 942; Ewart, Estoppel, 187, 188.

[41] *Boston Tow Boat Co.* v. *Medford Nat. Bank* (1919), 232 Mass. 38. 121 N. E. 491; *In re Bahia & S. F. Ry. Co.* (1868), L. R. 3 Q. B. 584; *Sheffield Corp* v. *Barclay*, [1905] A. C. 392, 404; *Oliver* v. *Bank of England*, [1902] 1 Ch. 610; *Clarkson* v. *Mo., etc., Ry. Co.* (1905), 182 N. Y. 47, 74 N. E. 571; see 34 Harv. L. Rev. 305.

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operation in the transfer of a chose in action, as the assignee takes only an equitable title which does not defeat prior rights. In general, the assignee of a non-negotiable chose in action stands in the shoes of his assignor, as to all equities or defences in favour of the obligor or debtor party. Thus, in Minnesota, it is held that where a debt is secured by mortgage and also by a negotiable promissory note, the mortgage is a chose in action as between the mortgagor and any subsequent assignee, and is exposed to the same defences in the hands of the assignee as in the hands of the original mortgagee.[42]

There is much difference of opinion and decision, however, as to whether or not innocent purchase of a chose in action will cut off the latent equities of prior holders and third persons, of which the assignee had no notice.[43] The doctrine of *bona fide* purchase for value in connection with negotiable instruments as also in connection with choses in action has a double aspect. Taking free from equities of *defence, i.e.*, defences good against the maker or obligor, turns on different principles from the cutting off of equities of *ownership* in favour of prior holders and third parties.[44]

The cutting off of the equities of a prior holder of the paper is not based on any principle peculiar to negotiable instruments, but rather upon the transfer of the legal title, which has the same effect in all sorts of property. As to the latent equities of third parties,

[42] *Johnson* v. *Carpenter* (1862), 7 Minn. 176 (Gil. 120); *Hostetter* v. *Alexander* (1876), 22 Minn. 559; *Watkins* v. *Goessler* (1896), 65 Minn. 118, 67 N. W. 706; see also *Moffett* v. *Parker* (1898), 71 Minn. 139, 144, 73 N. W. 850; *Olson* v. *Northwestern Co.* (1896), 65 Minn. 475, 478, 68 N. W. 100; *Bailey* v. *Smith* (1863), 14 Oh. St. 396, 84 Am. Dec. 385; compare *Carpenter* v. *Logan* (1872), 16 Wall (U.S.) 271, 21 L. Ed. 313.

[43] Ames, 1 Harv. L. Rev. 7; Ames, Cases on Trusts, 2nd ed., 310; *Brown* v. *Equitable Assurance Co.* (1899), 75 Minn. 412, 420, 78 N. W. 103; *Newton* v. *Newton* (1891), 46 Minn. 33, 48 N. W. 450; *Moffett* v. *Parker* (1898), 71 Minn. 139, 143, 73 N. W. 850.

[44] Ewart, Estoppel, 391, 423; Chaffee, Rights in Overdue Paper, 31 Harv. L. Rev. 1104.

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accordingly, the rule as to negotiable instruments and ordinary choses in action may well be the same, unless the title of the assignee of a chose in action be regarded as equitable merely. It is, therefore, not true as Pomeroy contends,[45] that the doctrine of cutting off latent equities of third parties would, in effect, make all choses in action negotiable. Negotiability is produced by issuing an obligation in negotiable form, creating an "ambulatory" credit which is intended to circulate freely as the obligation of the debtor party. The effect of the *bona fide* purchase for value in cutting off latent equities of prior holders on the other hand is the same as in case of land or goods.[46] As Ewart points out,[47] land is not negotiable, but if an owner executes an absolute conveyance to his mortgagee instead of a mortgage, he is estopped from setting up his equities against an innocent purchaser from the grantee. Just as the owner of tangible property subject to some trust or equity can transfer his legal title free and clear to an innocent purchaser, so the holder of a non-negotiable security at least if represented by a document, can do the same. Thus, as we have seen, certificates of stock in this respect resemble tangible property.[48]

The foundation of the doctrine protecting holders in due course of negotiable paper is doubtless the convenience and necessities of business which require that purchasers be permitted to rely on the usual evidence of title and obligation. But the peculiarity consists in cutting off defences based on infirmities in the creation of the original obligation rather than in cutting off latent equities, and innocent purchase after maturity may well cut off the equities of ownership, even if not the equities of defence.[49]

[45] 2 Pomeroy. Equity Jur., sec. 708, 711, p. 1443.
[46] Ewart, Estoppel, 396, 423; Lee, 28 Albany L. J. 290, 296.
[47] Estoppel, 418.
[48] Machen, Corporations, secs. 840, 904, 916; 1 Williston, Contracts, sec. 438.
[49] Chaffee, Rights in Overdue Paper, 31 Harv. L. Rev. 1104, 1108; Ewart, Estoppel, 423.

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According to Ewart, the protection of the holder in due course of negotiable paper is based on estoppel, (1) as against the obligor, from putting into circulation an ambulatory instrument which is intended to be taken at its face value; (2) as against prior holders, because the holder has been given apparent title and other claimants are estopped to set up their claims against a purchaser who has relied on his ostensible ownership. There is, of course, also the policy of giving faith and credit to the document and making possession conclusive evidence of ownership so that a purchaser for value, even from a thief or finder, is protected provided the instrument is endorsed to him or is endorsed in blank. According to Professor Chaffee, a policy similar to that of estoppel underlies the law as to the transfer of negotiable instruments.[50]

In the United States where the owner of stock or other semi-negotiable securities assigns them for a special purpose, and clothes the assignee with apparent *indicia* of title, he will estop himself as against a subsequent purchaser from setting up a claim good against the first assignee. Thus a *bona fide* purchaser of a certificate of stock prevails over one having merely an equitable right against his assignor. The same thing is generally true of non-negotiable notes, bonds and other choses in action represented by a document. The holder of the document which embodies the claim and is the best evidence of the right to it, has ostensible ownership, and the purchaser who obtains delivery of the instrument will take free and clear of any latent equities.[51]

"If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting title as against a person to whom such third party has dis-

[50] Chaffee, 31 Harv. L. Rev. 1118, 1119.

[51] 2 *Moore* v. *Moore* (1887), 112 Ind. 149, 13 N. E. 673; Williston, 30 Harv. L. Rev., 102, 104; 1 Williston, Contracts, sec. 438. But see *Brown* v. *Equitable Life Assurance Society* (1899), 75 Minn. 413, 78 N. W. 103, 79 N. W. 968; *Moore* v. *Jervis* (1845), 2 Collyer 60.

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posed of it, and who received it in good faith and for value."[52]

Thus, in *Moore* v. *The Metropolitan Bank*,[53] one Moore held a non-negotiable certificate of indebtedness of the state of New York for ten thousand dollars. Miller procured an assignment of the certificate from Moore by fraud and without consideration. Moore assigned to Miller by an endorsement as follows: "For value received, I hereby transfer, assign and set over to Isaac Miller the within described amount, say ten thousand dollars." Miller then assigned the certificate as security for a loan to the defendant bank. It was held that Moore, the assignor, was estopped, and that the bank was entitled to hold the certificate as security, but the plaintiff was permitted to redeem on payment of Miller's debt to the bank. The assignment being procured by fraud was voidable; yet the latent equity of the assignor to avoid it was cut off by assignment to an innocent purchaser who took on the faith of the apparently absolute title given by the owner to the fraudulent assignee. There are the same grounds for estoppel against the assertion of the plaintiff's equity whether the *bona fide* assignee acquired a legal or an equitable title to the chose in action.

Pomeroy criticises the opinion of Grover, J., in *Moore* v. *Metropolitan Bank*,[54] and would confine the estoppel of the assignor to securities which have acquired a semi-negotiable character by business cus-

[52] Lord Herschell in *Colonial Bank* v. *Cady* (1890), 15 A. C. 267, 285. In *McNeil* v. *Tenth National Bank* (1871), 46 N. Y. 325, 329. 7 Am. Rep. 341, 343, it is said: "Where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over the property, and the innocent third parties are led into dealing with such apparent owner, they will be protected." See also *Boice* v. *Finance Co.* (1920), 127 Va. 563, 102 S. E. 591, 10 A. L. R. 654; 24 R. C. L. 478; *Cochran* v. *Stewart* (1875), 21 Minn. 435, s. c. (1894), 57 Minn. 499, 507, 59 N. W. 543. See also dissenting opinion of Start, C.J., in *Brown* v. *Equitable Life Assurance Society* (1899), 75 Minn. 422, 78 N. W. 103; 2 Pomeroy Equity Jur. sec. 710; *Lee* v. *Turner* (1886), 89 Mo. 849; *Otis* v. *Gardner* (1883), 105 Ill. 436.

[53] (1878), 55 N. Y. 41.

[54] (1878), 55 N. Y. 41.

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tom.[55] He would not allow the effect of estoppel to be produced by the mere assignment of any ordinary non-negotiable chose in action even if absolute on its face. He contends that this would abolish the distinction between negotiable and non-negotiable instruments, as there would be equal ground for estopping the debtor party from the fact of issuing the undertaking and thereby creating an apparent liability against himself.[56] Pomeroy admits that the tendency of the courts is to extend the doctrine of estoppel to all species of things in action which are embodied in instruments in writing, and to hold that the purchaser of a non-negotiable security is protected against the claims of one who has by his own act conferred on another the apparent title and power of disposition.

A case involving this question of latent equities which gave no little trouble to the Minnesota court is that of *Brown* v. *Equitable Life Assurance Society*.[57] Plaintiff, the owner of a life insurance policy, assigned the policy to H. by a written assignment, absolute in form, but in fact merely as security for a loan which H. agreed to procure, but failed in securing. H. was allowed to remain in possession of the policy for eleven years and fraudulently assigned the policy to a bank as security for a loan. The bank made the loan, relying on the absolute assignment from the plaintiff to H., and believing that H. was the true owner of the policy, without any knowledge of any equities between plaintiff and H.

It was first held that the bank took the assignment of the policy subject to the equities between plaintiff and H., and that plaintiff was not estopped as to the bank to assert his rights by the fact that he had executed and delivered to H. an assignment of the policy absolute in form. There was a vigorous dissenting opinion, however, by Chief Justice Start, in which

[55] 2 Pomeroy, Equity Jur., sec. 710, 711.

[56] That there may be ground for such estoppel, see *Marling* v. *Fitzgerald* (1909), 138 Wis. 93, 130 N. W. 388, 23 L. R. A. (N.S.) 177; *Moffett* v. *Parker* (1898), 71 Minn. 139, 144.

[57] (1899), 75 Minn. 412, 78 N. W. 103, 79 N. W. 968.

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Collins, J., concurred, on the ground that the payee had clothed his assignee with the apparent absolute title and should be estopped as against an innocent purchaser from asserting any latent equities. Upon re-argument, the members of the Court agreed that the conduct of the plaintiff was such as equitably to estop him, but the mere fact that the assignment from him to H. was absolute in form did not create such an estoppel. Chief Justice Start and Justice Collins, however, were in favour of a reversal on the broader ground.

Ewart criticises the case[58] on the ground that usually the fact of enabling another person to mislead a purchaser by appearing to be the owner of the property is an amply sufficient ground of estoppel.[59]

In *Cochran* v. *Stewart*[60] it was declared that if the owner of a chose in action executes an absolute assignment of his claim and delivers it with the evidences of the chose in action, his assignee has power to transfer to a purchaser for a valuable consideration and without notice the title which he appears to have by the assignment and the possession of the evidences of the debt. In this regard the Court could see no difference between transfers of choses in action and other personal property. The equity of the innocent purchaser, though subsequent in time, is superior in degree to that of the defrauded assignor.[61] As Professor Williston points out,[62] a distinction must be drawn in discussing the assignment of choses in action between, (1) non-negotiable securities, overdue

[58] Ewart, Estoppel, 417.

[59] See also *Plummer* v. *Peoples Bank* (1884), 65 Ia. 405, 21 N. W. 699; *Quebec Bank* v. *Taggart* (1896), 27 Ont. 162; *Tripp* v. *Jordan* (1913), 177 Mo. App. 339, 344, 164 S. W. 158; *Culmer* v. *American Grocery Co.* (1897), 21 N. Y. App. Div. 556, 48 N. Y. S. 431; *Cochran* v. *Stewart* (1875), 21 Minn. 435.

[60] (1875), 21 Minn. 435.

[61] See also *Moore* v. *Moore* (1887), 112 Ind. 149, 13 N. E. 673; *Combes* v. *Chandler* (1877), 33 Oh. St. 178; *Farmers National Bank of Salem* v. *Fletcher* (1876), 44 Ia. 252; *State ex rel. State Bank* v. *Hastings* (1862), 15 Wis. 75, 83; *Baker* v. *Wood* (1894), 157 U. S. 212, 39 L. Ed. 677, 15 S. C. R. 628; *Cowdrey* v. *Vanderburgh* (1879), 101 U. S. 572, 25 L. Ed. 923.

[62] 30 Harv. L. Rev. 102, 1 Williston, Contracts, sec. 438.

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notes, certificates of stock, non-negotiable bonds, certificates of debt, savings bank books, and others embodied in documents, the possession of which gives the apparent ownership, and (2) written assignments of parol choses in action, and (3) oral assignments of intangible choses in action, such as judgments. This latter class is not intended to circulate as a subject of commerce, and Professor Williston suggests that there is little reason to prefer the assignee to the defrauded owner of the claim. Where the sale of property is a necessary function of commercial activity, it is desirable to protect a *bona fide* purchaser; but there is no sufficient policy to protect a purchaser in dealing in some classes of property.

Ames supports the view that an innocent purchaser of any chose in action from one who held it subject to latent equities, *i.e.*, equities in favour of third parties, should take free and clear. He does so upon the ground that the assignee gets a legal power of attorney to collect or dispose of claims for his own use.[63] A purchaser for a valuable consideration should not be deprived by a court of equity of any advantage in law which he has fairly obtained for his protection.[64] But as Williston points out, the defrauded original owner has an equity prior in time and therefore superior to that of the ultimate assignee, if the latter's right is merely equitable.[65] If the assignee is regarded as acquiring a legal title to the assigned right, latent equities would be cut off. If he enforces merely the assignor's rights as under a power of attorney from him, he would be subject to the same defences.[66]

Professor Cook takes the position that an assignee of a chose in action acquires a legal title, but says that the problem involved in *bona fide* purchase for value as shown by statutory extensions is purely one of public policy and not of logical deduction from sup-

[63] Ames, Lectures, 258.
[64] *Eyre* v. *Burmeister* (1862), 10 H. L. C. 90.
[65] 30 Harv. L. Rev. 102, 1 Williston, Contracts, sec. 438.
[66] See also Kenneson, 23 Yale Law Journal 193, 204, 447.

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posed intrinsic characteristics of legal and equitable titles.[67]

Thus, in the case of the assignment of mortgages, which are often spoken of as choses in action, but are really transfers of an interest in property to afford a means for the enforcement of a chose in action, it is commonly held that the assignee is protected against latent equities of third persons, even if not against the equities of the mortgagor. Persons dealing in such securities can inquire of the makers of the obligation whether any defences exist as against them. But it is not practicable to inquire whether latent equities exist in favour of unknown third persons as against prior holders.[68] It may be argued that judgments are not adapted to transfer and are not necessary instruments of active business, and the harsh rule which excludes latent equities for the benefit of commerce need not be applied.[69] Commerce will not be impeded by requiring the purchaser to take an assignment at his peril, or by the rule that if they are assigned, the assignee takes only the interest which the assignor had, and is bound to submit to prior equitable rights of third persons. To deprive such persons of just rights without subserving any public policy would be the mechanical application of a rule of law devised for other purposes.[70]

In a number of states, as also in England, it is held that if an assignee of a chose in action purchases in

[67] 30 Harv. L. Rev. 476, 477, 479, 480. See also Lee, 28 Albany L. J. 290, 296; 5 C. J. 974.

[68] *Silverman* v. *Bullock* (1881), 98 Ill. 11. 19; *Mullanphy* v. *Schott* (1891), 135 Ill. 655, 26 N. E. 640; *Schultz* v. *Sroelowitz* (1901), 191 Ill. 249, 61 N. E. 92.

[69] *Pearson* v. *Leucht* (1902), 199 Ill. 475, 482, 65 N. E. 363; *Sutherland* v. *Reeve* (1894), 151 Ill. 384, 393, 38 N. E. 130; *Cutts* v. *Guild* (1874), 57 N. Y. 229; *State ex rel. Rice* v. *Hearn* (1892), 109 N. Car. 150, 13 S. E. 895; *Gillett* v. *Murphy* (1898), 7 Okla. 91, 54 Pac. 473; *Downing* v. *South Royalton Bank* (1866), 39 Vt. 25. See however, to the effect that latent equities are cut off, *Western Bank* v. *Maverick* (1892), 90 Go. 339, 16 S. E. 942; *Duke* v. *Clark* (1880), 58 Miss. 465; *Yarnell* v. *Brown* (1897), 170 Ill. 362, 368, 48 N. E. 909; *Baker* v. *Wood* (1894), 157 U. S. 212, 39 L. Ed. 677, 15 S. C. R. 577.

[70] See *Bailey* v. *Smith* (1863), 14 Oh. St. 396, 84 Am. Dec. 385; 2 Pomeroy, Equity Jur., secs. 703, 708.

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good faith and for value without notice of an earlier assignment, he may obtain priority by giving notice to the trustee or obligor, although he himself made no inquiry of the trustee, debtor, or obligor, and this even after knowledge of the earlier assignment.[71] The primary object of giving notice to the debtor is to prevent collection by the assignor. As Professor Williston says, this rule which gives priority to the first assignee who gives notice may be compared in its effect to a recording act, or to the rule in sales preferring a second vendee with delivery over a prior vendee without delivery. In many jurisdictions in this country, however, this rule is not adopted, the transfer being complete and the assignor divested of all his interest without notice to the debtor, and priority in the time of assignment controls.[72] By the other view, the giving of notice by the assignee is regarded as the nearest approach to the taking of possession. But it is difficult to perceive any reason to cut off the first assignee where there is no estoppel and no reliance by the second assignee on the absence of notice to the debtor.

[71] *Dearle* v. *Hall* (1828), 3 Russ. 1; Ames. Cases on Trusts 326; Scott, Cases on Trusts 623, note; Pomeroy, Equity Jur.. sec. 695; 5 C. J. 953; *In re Hawley* (1916), 233 Fed. 451; 1 Williston, Contracts, sec. 435.

[72] *Lewis* v. *Bush* (1883), 30 Minn. 244, 15 N. W. 113; *Burton* v. *Gage* (1902), 85 Minn. 355, 88 N. W. 997; *Quigley* v. *Walter* (1905), 95 Minn. 383, 104 N. W. 236.

(*Continued in March issue.*)

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FROM CONTRACT TO STATUS.

By Prof. E. F. Albertsworth.

Sir Henry Maine, founder of the English Historical School of Jurists, writing in 1861, believed that the course of legal history generally could be explained as a progress from status to contract, from a period where legal institutions paid no regard to volition to one where will was chiefly emphasized.[1] He was led to take this position by a long and careful study in the Roman Law and the law of primitive peoples. It has been pointed out by a leading American jurist that Maine's generalization was undoubtedly true in the Roman Law, but not in the Common Law, where the central doctrine, from which all liabilities and duties flowed, in the absence of volition, was one of relation.[2] The problem now to be investigated is, How far is the legal order to-day attempting to put men and their activities into the legal category of a status, in order perhaps the better to realize those ends for which the law exists? Can it be said, then, that there is progress in the larger sense, if it appears that status is once more receiving emphasis?

When Maine wrote, the dominant viewpoint of Civil and Common Law jurists and philosophers quite generally was, that the end of the legal order was to secure to individuals a maximum of individual self-assertion or liberty. Law and the State were believed to have arisen to secure and conserve this liberty, these natural rights of the "abstract" man; this was the inheritance from the Eighteenth Century Natural Law School. Moreover, the reforms inaugurated by the Benthamite program were in full swing, the conception of Bentham and his followers being that men should be unshackled and set free from the traditional

[1] Ancient Law, Chapter 5.

[2] Roscoe Pound. The End of Law as Developed in Juristic Thought. 30 Harv. L. Rev. 211.

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rules, and that that government was best which governed least; legislation was an evil, and the less of it the better.[2] In the same spirit Kant had attempted to solve the problem of the authority of law and the State on the one hand, with the freedom of the individual on the other, by postulating a common rule of freedom according to which the will of one might be reconciled with the will of the many. Hegel, writing after Kant, had looked at law as the expression of the Idea of liberty, unfolding *a priori* or logically in human consciousness; while Savigny, contemporary and colleague of Hegel, had likewise looked for this principle of freedom and free will, unfolding in the life of a people. The French Revolution, which was then fresh in the experience of all, had set free tendencies toward individualism, which seemed to corroborate in the world of fact that which jurists and philosophers were agitating in the realm of theory.

While the zeal of these men to bring about greater individual liberty resulted in many reforms, particularly in ridding the body of the law of inherited abuses and conceptions which no longer functioned for that time, it is undoubtedly true that their conception of liberty, degenerating into that of the abstract man, with little attention paid by courts or counsel to the actual *de facto* social and economic conditions, brought about serious checks to much of the social legislation of the immediate past. It led to what Rudolf Jhering on the continent and other jurists in America called "A jurisprudence of conceptions," to a process of drawing legal inferences from some abstract legal principle and then applying this deduction to the case in hand, rather than attempting to fit the case to the principle.

And in this connection it is interesting to observe how the Courts which decided cases under the influence

[2] "Liberty, the first blessings, the aspiration of every human soul, is the supreme object. Even abridgement of it demands an excuse, and the only good excuse is the necessity of preserving it. Whatever tends to preserve this is right, all else is wrong." Carter, Law; It's Origin, Growth and Function, 336.

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of the ideal of individual liberty, where liability was supposed to flow in both tort and contract from voluntary action and exertion of the will, explained those situations in the law where this was not the case. The absolute liability imposed by the law on the owner of trespassing cattle was explained on the dogmatic fiction of negligence; or by the fiction of representation in case of servants and agents, whereby the fault was made to appear that of the principal or master; and by implying promises in cases of inequitable retention of benefits; by annexing duties to certain relations and callings, or lastly, as historical or archaic survivals. As a matter of fact, all these were instances of liability without fault where volition was not regarded; but as long, as in England, the social order was a settled community it was undoubtedly necessary, and the reasons given by the courts for the "exceptions" appeared to be satisfactory. And in America, a pioneer community, where the general security was not so liable to be impaired because of sparsely settled communities, the principle of no liability unless fault was gradually left to die out. But as conditions in this country became more settled, as they are to-day, the old idea came to rebirth; and it is this new phase and its consequences in which our interest at present centres. For the conception of relation is intimately bound up with the idea of liability without fault.

In the Granger cases,[4] decided more than twenty years ago, Mr. Justice Brewer, an individualist of the old school, as his colleague Mr. Justice Field, protested to putting the business of warehouses in a certain status, whereby they would be compelled to furnish such services on such reasonable rates as the legislature might prescribe, voicing his objection in these words: "It seems to me that the country is rapidly travelling the road which leads to the point where all freedom of contract and conduct will be lost." Nevertheless, if any practice has become well estab-

[4] *Munn* v. *Illinois*, 94 U. S. 113.

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lished in our law to-day it is that of requiring certain businesses, whether their owners willed so or not, to do and not to do certain things merely by virtue of their status. The persistence of hostility to this notion may be attributed in part to the *laissez faire* economics and individualistic legal doctrines of the nineteenth century which the judges permit to colour their view of legislative policy and legislative enactments; and in part also to an archaic conception of the nature and purpose of the law—either that it is a body of legal principles and rules which human effort cannot consciously change, and that the law exists to secure the maximum of individual liberty, and not, as appears to be the dominant view of the present, to secure a maximum of human wants with the least sacrifice of other human needs.

Our whole law of workmen's compensation is based upon the principle of liability without fault, or in other words, because of a certain status into which the employer has been placed, irrespective of his volition, certain duties and liabilities flow therefrom. The statutes dealing with this beneficent phase of the law usually provide for liability of employers, especially in hazardous occupations, for death or injury of any employee due to conditions of such occupation in all cases in which the employee was not contributorily or wilfully negligent. Some of the more liberal statutes abolish contributory negligence, assumption of risk, and the fellow-servant rule, as defences for the employer. While the judiciary is gradually accepting this principle of a status of the employer and the employee regardless of their volition, yet the five to four decision of the Federal Supreme Court in *Arizona Copper Company* v. *Hammer* shows the tenacity of the older views inherited from the past.

Moreover, in the gradually increasing output of the state legislatures with reference to minimum wages of workmen, the employer has been denied power or freedom to contract because of the status into which the Law has placed him. Although some twelve or more

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states now have minimum wage laws, this legislative reform had not been so widely adopted when compared with that dealing with workmen's compensation. Here again the views of the courts, that what was old was due process, led them to take a hostile attitude toward such innovations; although, as a matter of fact, if the principle or criterion of age be taken, the farther back research is carried it is observed that in the time of Elizabeth wages were fixed by the justices of the peace themselves, while in colonial days in this country, wages as well as prices were quite generally prescribed by the provincial assemblies. And of course the rate of interest on capital was, and still is, prescribed. In recent times, of course, much opposition to minimum wage legislation was raised by the employers. For fixing the wage at a certain minimum, appears on the surface at least to be compelling the employer affirmatively to assist the working men to correct social evils which the employer has not directly caused. However, in answer to this objection it may be said that the employer who underpays is actually injuring his employees so far as their standard of living, or even a minimum subsistence level, is concerned; and the mass of evidence produced by sociologists clearly shows the need of such legislation if the race is to realize its highest aims and if civilization is to progress.

The basic doctrine underlying the law of public utilities is that of a relational duty to the public, or one based on the character of the business profession of the public servant itself, rather than upon contract or agreement which flows from an exercise of the will. Research into the old common law has brought to light numerous cases in the year books, running back to Edward IV. and Henry VI. But as a result of the emphasis on individualism in England, due to a change from feudalism to industrialism, and the disappearance of the medieval guilds, the old idea of a relation or status giving rise to certain duties irrespective of contract, gradually disappeared, existing only perhaps

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in the case of inn-keepers and carriers. On the other hand, as a result of the growth of powerful combinations of capital gaining often a monopolistic control over certain fields of industry, and further as new conceptions of the relation between government and industry arose, and as social conditions became more congested and complex, the old idea of relation of status slowly revived and received greater emphasis in the law. At first the courts talked about the "implied" terms of the contract between carrier and public; or they found a dedication to the public; or again they said the business enjoyed the power of eminent domain. Gradually, however, when no contract could be worked out, nor the other *indicia* mentioned above could be discovered, the Supreme Court of the United States placed the liability of the public utility squarely on the ground of a status or relation. While some courts still use the word "contract" in talking of public service corporations they really mean status. Several fairly recent cases show the length to which courts are imposing liabilities upon such companies purely through the instrumentality of the conception of relation or status. In *Middleton* v. *Whitridge,* the court decided that there was an added duty imposed on a carrier to take care of the passenger who became sick on the journey. So also in *Gilkerson* v. *Atlantic Coast Line R. Co.,* the court said there was a duty upon a carrier to take a passenger so as to enable him to alight at his destination if the conductor actually agreed to do so.

So also as to the law of Insurance, we observe the conception of status or relation imposing many duties on these businesses apart from their volition. In *German Alliance Insurance Co.* v. *Lewis,* it was held that a State statute authorizing the superintendent of insurance to establish reasonable rates for fire insurance companies was constitutional. This case certainly rang the death knell on abstract theories of liberty or antiquated economic doctrines. Insurance is a necessity on the part of a great majority of the people, and

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being at the mercy of powerful corporations, the idea of a relation was here stressed also. Since the decision in the Kansas case, courts have upheld State legislation of various kinds with respect to insurance contracts in general, such as restricting the business to corporations, prescribing standard policies, prohibiting discrimination, providing for increased recovery penalty in case of rate agreements, etc.

While the law of landlord and tenant has always remained one of relationship of status being inherited directly of course from feudalism, yet recently the idea of relation or status has received considerable enlargement by at least the Federal Supreme Court. In the recent cases coming up from the District of Columbia and New York, the United States Supreme Court made large use of the idea of status in order to hold it constitutional for a State to prescribe reasonable rentals, regardless of the contract between landlord and tenant, and to deny to the owner power to eject the tenant at the termination of his lease. It is interesting to note in this connection how the Roman and Civil Law lawyers would have dealt with such a situation, and as likely before the decisions before mentioned, the lawyers in our own system would have done. Their solution would have been in terms of the will of the parties, the legal transaction being called a *locatio operarum*. This also undoubtedly would have been a method of legal reasoning or analysis employed by the earlier Common Law Jurists, but certainly to-day the trend of the law seems to be away from the conception of volition toward status, especially with reference to landlord and tenant. Though severe criticism by the legal profession has been made of these recent rent cases, some extremists saying that it will lead to socialism, nevertheless when the decisions are viewed in connection with the general trend of the law to emphasize the conception of relation wherever public welfare is involved no other result could have been reached.

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Likewise in other fields of the law, the doctrine of status is employed to work out rights and duties. For instance contracts made between mortgagor and mortgagee as to the sale of the equity of redemption will be given close scrutiny by the courts because of the status of the mortgagor, the courts saying that "a necessitous man is not a free man;" and therefore even though the mortgagor may have made a contract, hence involving act of will, to sell his equity, the courts may not give effect to it. So also in the contracts made between trustee and *cestui*, principal and agent, husband and wife, promoter and corporation, partners *inter se* and persons in other relationships, declarations of will may receive in the courts no effect, because the law has placed these individuals in a certain status to which the law annexes rights and duties. Moreover, when the question is regarding the tort liability of the owner of land, the question naturally arises whether the plaintiff was a trespasser, a licensee, or an invitee, because once the relation or status is established, certain liabilities and degree of care result.

Is this principle of emphasizing status and relation a wise one? By many, status is felt to be an archaic legal institution which in this day of progress we are supposed to have outgrown. And so some courts have held legislation unconstitutional which sought to protect and enhance the position of the workingman, by giving him higher wages or bettering working conditions on the ground that he was not in the position of a serf who needed special protection. But these are only prejudices inherited from the time when individualism and Roman Law ideas of emphasis on will were dominant in the thought of the time. To-day in urban and industrial communities, groups as well as individuals must be reckoned with. A leading jurist in America, who has emphasized the principles of the Sociological School of Jurisprudence, that the law should be a means and not merely an end, and that any legal doctrine or institution should be adopted by the

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law which leads appropriately toward this purpose, has said with reference to this conception of status, "We may perceive that in the idea of relation . . . we have an institution of capital importance for the law of the future, a means of making our received legal tradition a living force for justice in the society of to-day and to-morrow."

If Maine's generalization, that the progress of legal history had been from statuts to contract, be true only in the Roman and not in the Common Law, what can be said is the course of legal process in our own system of law? As we have already observed, the tendency in common law countries is to bring certain fields of human activity within the realm of status or relation. This undoubtedly, as has been shown, places restrictions on volitional activity. In other fields of conduct, or even of contract and property, we find the law imposing many limitations in the interest of the individual and the social group. This is notably the case in limitations upon property, liberty of contract, waste of natural resources, and holding the state to a larger degree of tort liability. In the field of industrial struggles, especially where public welfare and safety are threatened and endangered, we observe a sentiment to preclude actions by labour groups, or by these united with capital, which augurs well not only for a more peaceful settlement of the strike and the boycott, but for preserving social peace and order. In the field of large aggregations of capital, we note a tendency not to condemn as illegal on the sole ground of gigantic size, as in the case of the recent decision by the Federal Supreme Court in the United States Steel case. In the field of procedural reform, in order to bring about a maximum of justice, the objective is to give the courts greater freedom, either in permitting them to make their own rules of practice, or by the legislature passing a short Practice Act, laying down general or broad principles, leaving to the courts large discretion in suspending, adding, or modifying rules.

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In the delegation of powers to subordinate boards and commissions, the idea has long been abandoned that some metaphysical jural principle required this separation, in order to enhance the liberty of society and the individual; the real reason for some separation of powers being to insure to all a maximum of justice in the satisfaction of human wants. So also in reviewing the findings of these commissions and boards, the tendency appears to be that executive justice, if certain fundamental elements of hearing and notice are present, is equally efficacious as judicial or court justice in securing to individuals and property the interests which they may validly make.

From these tendencies of the law, in its various fields, it may be reasonably inferred that there is an attempt to give an increasingly greater recognition to securing by the law of a maximum of individual and social wants. The underlying conception in the law, as well as in other modes of social control, seems to be that mankind is moving toward some future goal of not only more perfect human relations, but also of a more complete control over external physical environment. The old law, under the conception that the ideal society was in the past, faced toward the past; the law of the present under the general prevalent notion of evolution and development, believes the ideal society is yet in the future, and hence its gaze is toward the future, toward progress. This means elimination of much in the law which has been inherited if it no longer functions to-day, but at the same time it may mean emphasis and retention of those ideas and legal conceptions which function equally well to-day. There is no escaping the conclusion that certain doctrines and institutions of the law have inherent worth and validity, giving much support to the tenets of the recent Revival of the Natural Law School in France, or to the conception of Stammler of a natural law with a varying content. This is true of the conception of relation or status, now coming back so promi-

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nently into our law; and other doctrines, such as constructive trust in the Common Law and excluding the unworthy heir or an implied hypothecation in the Civil Law. The mere fact of a doctrine being ancient should not be a ground of rejecting it; if it has utilitarian or pragmatic value, it should be retained and employed.

This, then, seems to be the direction that legal history and legal institutions at present appear to be taking, namely, that of an attempt to realize a maximum of human wants in order to reach a higher degree of civilization, the latter including more perfect adjustment of human beings to one another, and an increasing control and dominance by mankind over external nature to conserve their needs. The former involves a consideration of human beings as ends in themselves, or as Kant said, "a kingdom of ends," for which the law is to be a means, leads to limitations imposed by the law on the acquisition and use of property, reform of legal procedure in order to get at the substantive merits of the controversy, and finally more efficient governmental relations to industry through creation of boards and commissions. These seem at present the more pressing needs. But increasing control over nature, which is the second branch of civilization, must likewise not be overlooked. Hence in order to realize this objective, the goods and natural resources of society must be more evenly distributed either through ownership or power of control without ownership, involving in some instances a change from *res nullius* or *res communes* into *res publicae,* as is being done in some states to day in case of water and oil.

It must never be forgotten that the law is but one form of social control, like religion, general ethics, and the State. The reason for the existence of the law and the State is, not that they protect certain so-called "natural rights," which are supposed to run back and above all constitutions, but that they recognize and protect through legal rights certain interests which subjects or citizens of the body politic may have, being

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furthered by the law in order to advance civilization. Dealing primarily with external acts, instead of with thought and feeling, as do religion and morals, the law meets a need of which they are incapable. If it does this through recognition of a status in some instances, its objective is to improve the relations between human beings and to enable them to master and control physical nature. This is the goal of the law, rather than some superficial one of from "status to contract."

HARMONIZATION OF DOMINION AND PROVINCIAL LEGISLATION WITH THE BANKRUPTCY ACT.

The Editor,

THE CANADIAN LAW TIMES,
Toronto, Ont.

SIR,—Your readers are indebted to Mr. Falconbridge for his article in the January number of THE CANADIAN LAW TIMES on "Proposed Amendments to the Bills of Exchange Act." Now that the Dominion Parliament has accepted its obligation to provide a uniform bankruptcy or insolvency law for the Dominion, it is necessary that the Bills of Exchange Act be amended. It would be difficult to criticize the amendments suggested by Mr. Falconbridge, and it is to be hoped that the matter may be taken up at this session of the House.

But it is not the Bills of Exchange Act only which requires to be brought into line. In the period during which the Dominion Parliament neglected the legislative duty imposed on it by the British North America Act of providing a general bankruptcy or insolvency law, the Provinces were compelled to shift for themselves, and to attempt to build up some sort of a code

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for the administration of the affairs of insolvent debtors. This resulted in nine different codes throughout Canada, under which the powers of the assignee or curator were circumscribed by the limitations inherent in provincial legislation. (See per Duff, J., in *McNeil* v. *Sharpe* (1922), 62 S. C. R. 505, 516). During this period the statutes generally both of the Provinces and of the Dominion were framed in accordance with this state of affairs, and, consequently, it is now necessary to make them accord with the new situation. This work has been started in some, but not all, of the Provinces. It will not be extensive, for not many Acts are affected, and in those affected very slight changes are required, but it is nevertheless important if hard cases are to be avoided and unfortunate litigants are not to be defeated by unmeritorious technicalities.

I am, Sir,

Yours, etc.,

LEWIS DUNCAN.

February 16th, 1922.
38 King Street West,
Toronto, Ont.

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ROMAN-DUTCH *v.* ENGLISH LAW OF SALE.

By Sir Mackenzie D. Chalmers, K.C.B.*

Mr. MacKeurtan, K.C., of the South African Bar, has written an admirable monograph on the Roman-Dutch law of sale, or, as he calls it, the "Sale of Goods in South Africa." Apart from its intrinsic merits, his book presents several aspects of interest to the English lawyer. It is of interest to see how the old Roman law of the *Digest* and the *Institutes* can adapt its rules to the changing requirements of modern life and commerce. But the way in which Mr. MacKeurtan has done his work gives a more practical interest to his book. Where rules of Roman-Dutch and English law are in accord he freely cites English reported cases, and freely and frankly criticises them when occasion arises. Throughout the book he is not content with merely recording rules and decisions, but he raises and investigates doubtful points and gives his opinion thereon. As he puts it in his preface, "Where these opinions are right, it is time they were recorded; where they are wrong, I anticipate speedy correction." When an English lawyer runs up against a difficulty in dealing with the law of sale he would often find it helpful to see how the point is dealt with in the Roman-Dutch law. Roman law is the foundation of Scottish law, and an inexhaustible store of legal principles:

"The Roman law," says Tindal, C.J., in a well-known judgment, "forms no rule binding in itself on the subjects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it prove to be supported by that law—the fruit of the researches of the most learned men, the collective wisdom of ages, and the ground-work of the municipal law of most of the countries of Europe" (*Acton* v. *Blundell* (1843), 12 M. & W. at p. 244).

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As the English Sale of Goods Act merely enunciates and epitomises the principles of the Common Law, reference to Roman Law to elucidate doubtful points is no less useful than it was when Tindal, C.J., delivered his judgment.

From the point of view of comparative jurisprudence, the Roman-Dutch law is of curious interest. On a given state of facts, a South African Court and an English Court would probably arrive at the same conclusion in forty-nine cases out of fifty. But in many of those cases the conclusion would be arrived at by a different route. Some salient examples may be given to illustrate this position.

For practical purposes a sale in South Africa is on the same footing as a sale in England or elsewhere. The seller parts with the goods, and gets the price, the buyer pays the price and gets the goods. But the underlying theory of the transaction is different. In England, sale is the transfer of the property in the thing sold from seller to buyer for a price. In Roman and Dutch law, adhering to the Rule of Roman law, sale is "a mutual contract for the transfer of the *possession* of a thing in exchange for a price," plus a guarantee against eviction. Mr. MacKeurtan criticises this theory as being contrary to modern ideas, and inconvenient, and shows that it owes its origin to historical and not to utilitarian reasons (pp. 2, 170-2).

In England, when there is a contract of sale, and nothing is expressed as to the amount of the price or mode of fixing it, the buyer must pay a reasonable price. This doctrine of implied or reasonable price seems to be an original development of English law. In Roman or Roman-Dutch law the price or the mode of fixing it must be specified. Suppose a man goes into a shop and selects an article without asking the price. In that case Mr. MacKeurtan suggests a qualification of the rule which goes very near our rule of reasonable price. "It is submitted," he says, "that where the seller has a usual price—as in the case of a

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tradesman—there is a sale at that price," for the price is ascertainable.

Apart from any statutory enactment, there is a curious anti-profiteering rule in South Africa, founded on the Roman doctrine of *læsio enormis:*

> **Where a seller has sold movable property of appreciable value for less than half its true value at the date of sale, or a purchaser has similarly bought for more than double such true value, the party damnified is entitled to a rescission of the contract or a correction of the price at the option of the other. The remedy exists quite independently of fraud, and the reasons for its existence may be summed up in the necessity for the frustration of human cupidity (p. 17).**

Such a rule in England would spread consternation among horse-dealers, and many other respectable tradesmen.

In South Africa, as in England, capacity to buy or sell is determined by the general law concerning capacity to contract. But the law relating to personal status differs in many details from English law. For the most part the Roman-Dutch rules as to minors seem to work out pretty much as do the English rules, though the reasons given for them differ, but three points of divergence may be noted. First:

> **A male minor becomes a major by marriage, and remains a major, though the marriage be dissolved before he attains twenty-one. A female ceases to be a minor proper, and comes under the quasi-guardianship of her husband (p. 79).**

Secondly, the Roman-Dutch, like most of the continental laws, recognises the infant trader openly carrying on business on his own account. Thirdly, a minor, who expressly or impliedly represents himself to be of full age, is bound by his contract. The rules as to married women are complicated, but there is nothing corresponding to the English rule which confines the liability of a married woman to her separate estate free from restraint on anticipation. In addition to lunatics, Roman-Dutch law recognises the prodigal. The spendthrift may be judicially declared

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a *prodigus,* and interdicted from alienation or purchase without the leave of his curator (p. 98). The rule seems a sound one. There are many persons who, though sane for most purposes, are financial lunatics.

South Africa, for the comfort of its inhabitants, and the discomfort of its lawyers, has nothing corresponding to the Statute of Frauds:

> **There are no formalities prescribed by law in South Africa for the sale of corporeal movables in general, though the disposal of certain special commodities (*e.g.* firearms, poisons, etc.), is regulated by statutes to which the reader is referred (p. 128).**

In England the celebrated seventeenth section of the Statute of Frauds (29 Car. II., c. 3) is reproduced by sec. 4 of the Sale of Goods Act, 1893, with a proviso that it shall not extend to Scotland. That country apparently has never had any similar enactment, and has never felt the want of it. Contracts for the sale of goods of the value of £10 and upwards are regulated by the same laws of evidence as contracts in general. In England the construction of the short seventeenth section has given rise to more litigation than any other branch of the subject. Mr. Benjamin, in his work on sale (ed. 5) devotes 160 pages to discussing the reported cases. Decisions are still accumulating, but perhaps some day we shall free ourselves from this incubus. It may be noted also that South Africa draws no distinction between contracts under seal and contracts not under seal. Contracts under seal have no sacrosanct character, and a body corporate can contract in the same way as a natural person.

In Roman-Dutch law a contract of sale must be completed by delivery. There is nothing corresponding to the English rule that, in the case of unascertained or future goods, the contract may be implemented by the appropriation of goods to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller. But the divergence between Roman-Dutch and English law is more apparent than real. If the English cases be carefully examined, they

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can all be explained as instances of constructive delivery, or, as it is called in Roman law, *traditio brevi manu*. When English judges invented the doctrine of appropriation of goods to the contract to pass the property, the recognition of constructive delivery had either not developed or had been overlooked. If delivery, actual or constructive, were substituted for appropriation to the contract in sec. 18 of the Sale of Goods Act, the old Scottish rule would be restored; and the English rule would be made more intelligible.

As regards defects in the thing sold, Roman-Dutch and English law practically reach the same conclusions. The Roman law rule is *respondeat venditor*. The ancient English rule was *caveat emptor;* but, as Lord Campbell said in 1851, "the exceptions have well-nigh eaten up the rule," and secs. 13 to 15 of the Sale of Goods Act are in substantial accord with the Roman-Dutch law, though in the latter the rule is rather more broadly stated.

> The true rule is not that the seller is only bound to warrant against latent defects, and not against patent ones, but that he is bound to warrant against all defects. But where the purchaser makes an inspection at or before the purchase which did disclose or ought to have disclosed a defect, he cannot afterwards complain, not because the seller, as a general rule of law, does not warrant against patent defects, but because by his conduct the purchaser is deemed to have waived his right, and to have bought the article subject to the disability, which, but for his laches, he would have discovered, or which he did discover, but considered of no consequence (p. 188).

The English rule of market overt is an anomalous survival, and there is nothing that resembles it in Roman-Dutch law. As the custom of market overt prevails in the City of London, if a man buys a stolen watch in Fleet Street, he gets a good title to it, liable only to be defeated if the thief is caught and prosecuted to conviction. But if he buys the stolen watch in the Strand, a few yards outside the City boundary, he gets no title to the watch, and can give none to anyone else. Scotland and South Africa do not indulge in

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these illogical exceptions to the general rule *nemo dat quod non habet.*

The question whether the right of stoppage *in transitu* exists in South Africa seems to have been much debated. Mr. MacKeurtan examines the question at length, and contends that it does not (pp. 248-53). But there are cases where the unpaid seller can recover his goods, although he has delivered them to a carrier for transmission to the insolvent buyer. After dealing with sales for cash, Mr. MacKeurtan goes on to say:

> If the sale is on credit, the vendor may, where delivery to the carrier is not delivery to the buyer, withhold delivery where the purchaser is insolvent in the English or South African sense, and where delivery to the carrier is delivery to buyer, he may stop in transit or recover from the buyer, or parties in possession, if the buyer becomes insolvent in the South African sense immediately after.

It seems, then, that in some cases the South African seller has a right of revendication, which exceeds the English right of stoppage *in transitu.*

Most of the theoretical, and some of the practical differences between English and South African law, owe their origin to the Roman doctrine that sale is not a transfer of the property in goods, but merely a transfer of possession with a super-added guarantee against eviction.

But a gift in South Africa, like a gift in England, transfers the property in the thing given to the donee. This divergence between sale and gift gives rise to some rather curious and interesting developments, which Mr. MacKeurtan sums up in the following terms:

> First, where a sale at an inadequate price, or at an adequate price which is not intended to be exacted, is concluded between persons between whom gifts are prohibited by law. In such circumstances the Courts will, upon the transaction being challenged, inquire into the adequacy and exaction of the price, and, if satisfied that it is colourable, will declare it to be a gift. Secondly, when a sale is made for an inadequate price. In such case the transaction may, for that reason, be invalid as a sale, but valid as a gift; as

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where, for instance, the price is so low as to bear no appreciable relation to the value of the article, but the seller has fixed it on the ground of his affection for the purchaser. Where the price is not so low as to warrant the conclusion that the whole transaction is a gift, the transaction may be regarded as the sale of the article, with a gift of the amount by which the price is inadequate, and the paramount intention being that of sale, the contract will be treated accordingly.

This comes out very near the English rule that the Courts will not inquire into the adequacy of any *bona fide* consideration.

Probably enough has been said in this short notice of a very suggestive book to show that England and South Africa might each, with advantage, borrow certain principles from the law of the other country.

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EXTRADITION.

By A. E. Popple.

The present law, under which a person is extradited from the United States, has many defects. It is limited to a small number of crimes, and if it is desired to add a new crime to the list, all the formalities of a treaty between two nations are necessary. In this respect, Canada is less fortunate than a foreign country, because the treaty must be made with Great Britain and not direct with Canada. Then, again, the duties and obligations of nations have to be considered and the business of extradition must be conducted with due decorum and solemnity, according to diplomatic traditions. This barrier, however, is gradually being broken down between Canada and the U. S. A. by the persistent efforts of the various Provincial Governments in their endeavour to reduce the cost of extradition. After the diplomatic channel has been cleared, and the red tape wound up, then the applicant for the extradition must face the technicalities of the law. If the evidence to be used on the hearing does finally arrive in time, which is not very often, then the authentication must be established. This in itself is no small item. Then the identification of the accused, the proof of the foreign law—let alone the establishment of a *prima facie* case—render the proceedings very hazardous. These are merely the legal difficulties which the applicant must face in a foreign country.

It must be obvious to any one, who has the least knowledge of extradition, that to-day there is a tendency to supplant extradition procedure by deportation under the Immigration Act. Now if this is accepted as a fact, and I do not think anyone who remembers the Harry Thaw incident in Canada will deny it is a fact, then the sooner we face the situation the better. Extradition procedure must either be reformed or it must go. All this procedure is simply

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a means to an end, and that end is the return of a fugitive criminal. He is *not* being tried for his crime. That takes place in the regular way on his return to his former country. Why, then, should all this be so necessary? Surely it is merely a remnant of the old style of diplomatic procedure which nations are now discarding as vexatious and replacing by direct communication between the principals concerned.

There can be no doubt that a reform in extradition procedure would be beneficial. It is intricate, cumbersome, uncertain, subject to long delays and very expensive. It could be simplified by legalizing the present subterfuge system of deportation through the immigration authorities, with the addition of safeguards for the accused. It should be possible to extradite for any indictable offence, and an application for extradition should be made possible through the local immigration office. This would, of course, require legislation, but there is the Immigration Act, and the machinery under it available. An amendment to that Act would, along with similar legislation by the U. S. authorities, be the only necessity and in these enlightened days surely it is possible to tackle such a question without danger of a political upheaval or the prospect of a war.

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KING'S COUNSEL.

What is "King's Counsel"? It is nothing more nor less than a Title of Honour conferred by the Crown, but confined to members of the Legal Profession. We are told the first recipient of the honour was Sir Francis Bacon, from Queen Elizabeth, and that Sir Allen Napier McNabb, J. S. Cartwright and Henry Sherwood were the first to receive it in this country, January, 1838.

As the title is intended to indicate professional merit, some definite qualification should be adopted without which the title would not be conferred, such as the following:—

(a) At least 10 years standing at the Bar of Ontario or at a Bar elsewhere in the British Empire.

(b) A graduation in law from some University in the British Empire.

(c) Must have acted as leading counsel in at least 25 actually contested trials in the Supreme Court of Ontario or the Exchequer Court of Canada, or on actually contested applications before Royal Commissions or Commissions constituted under a Statute of the Province of Ontario or of the Dominion of Canada, or before Committees of Parliament or of the Legislature.

(d) Must have acted as leading counsel in at least 15 appeals to the highest appellate tribunal of the Province of Ontario.

(e) In place of (c) and (d), be the author of at least two books, or one book that has had two issues of at least 1,000 copies each on legal subjects, which works are generally received as authorities in Ontario Courts.

ONTARIO BARRISTER.*

February, 1921.

* EDITOR'S NOTE.—We would esteem it very much indeed if some other legal men in different parts of the Dominion would express their views on this subject, which is one that concerns the prestige of the Profession.—B. T.

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BANKRUPTS AND THEIR TAXES.

What is the position of a creditor Municipality under the Bankruptcy Act? Has it a priority in the distribution of assets for taxes due from the Bankrupt and in arrear? If so what is the extent of its priority and where does it rank in order of priority?

These are questions which frequently present themselves.

Sub-section 6 of sec. 51 of the Bankruptcy Act, which deals with the priorities of various claims in the distribution of the property of a Bankrupt, provides as follows:

> "Nothing in this section shall interfere with the collection of any taxes, rates or assessments now or at any time hereafter payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the Dominion, or of the province wherein such property is situate, or in which the debtor resides, nor prejudice or affect any lien or charge in respect of such property created by any such laws."

It seems to have been taken for granted that this provision conferred upon Municipalities the same priority and preference under the Bankruptcy Act as had been enjoyed under the former Provincial Legislation dealing with Assignments, but the decision in *Re West*, reported in Vol. 2, Part 1, the Canadian Bankruptcy Reports at page 14, shows effectually that such an assumption is ill founded.

This decision turned upon the effect of the Ontario Assessment Act, Section 109, and whilst other Provincial Legislation has not been closely examined it is assumed that other Provinces have enacted similar legislation. At all events the City Act, sec. 469, and the Town Act, sec. 449, of Saskatchewan, are identically similar with the Ontario Enactment, and if *In re West* is good law the same result must ensue in that Province.

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One of the questions in *Re West* was this:—

"Are Business Taxes due to a municipality in respect of which a municipality has not exercised its statutory right of distress or seizure before the bankruptcy entitled to any priority over unsecured claims."

It was argued for the Municipality that the provision of the Ontario Assignment Act creating a lien for business taxes on property in the possession of any "assignee for the benefit of creditors" applied to goods in the possession of "an authorized trustee" under an authorized assignment, but it was held by Judge Orde that the provision must be construed strictly and that it did not confer any priority under the Bankruptcy Act.

Orde, J., in his Judgment, suggested that possibly there might be a right in a Municipality to distrain for taxes charged on land, but this point did not require to be decided; but in connection with this sec. 11 of the Bankruptcy Act is to be considered; also the effect of sub-sec. 6 of sec. 51, which creates in favour of taxes a lien on the land.

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NOTABLE CASES NOTATED.

Sale of Goods Act—Implied Condition of Fitness.

The case of *Sumner* v. *Webb*[1] is important and instructive upon Section 14 of the Sale of Goods Act, 1893. This Act, with a variation here and there in the numbering of the sections, etcetera, has been enacted in all the Provinces of Canada with the exception of Quebec. This decision of the Court of Appeal in England is therefore of general value. The Plaintiffs, a firm in Argentina, purchased from the Defendants for importation into Argentina, a tonic water of which the Defendants were manufacturers and which they had been supplying to the Plaintiffs in Argentina for years. There was a Law in Argentina prohibiting the importation of any commodity containing salicylic acid, and it was discovered that the goods sold by the Plaintiff did contain this acid. The Government authorities ordered the goods to be destroyed or re-exported. But this had been done after the course of trading between the Plaintiff and Defendant had gone on for years without either party being aware of what they were doing. The Plaintiff, at all events, knew that the goods contained the acid, but did not know the prohibitive Law of the Argentina; while the Defendant did know the Law but did not know the existence of the acid in the goods imported.

It was held, reversing the decision of the trial Judge (1) that as the Plaintiffs had not shown that they relied on the Defendant's skill and judgment on the question whether the goods could be legally sold in Argentina there was no implied condition as to the fitness for the particular purpose of importation; (2) that the words "merchantable quality" in the section had no reference to the state of the Law of the country to which the goods were sent and therefore the action failed.

[1] 37 T. L. R., p. 45.

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Mr. Justice Banks gave an exhaustive judgment which went far to elucidate many of the problems lying along the side of the case, though he said they were not necessary to his decision having regard to the view he took and on which he decided the action. One of these side questions was that the goods concerned in the action were a specified article sold under a trade name, "Webb's Indian Tonic Waters," and therefore there was no liability; another question was the condition precedent to the Defendant's liability that the Plaintiff or buyer had relied on the skill and judgment of the Defendant, had not been established.

There is a splendid explanation of what this really means which ought to be referred to.

The cases discussed were *Niblet* v. *Confectioners*[2]; and *Gillespie* v. *Cheney*.[3]

Construction of Contract.

The case of *Forbes* v. *Git et al.* recently decided by the Privy Council and reported,[4] is an exceedingly valuable one as it lays down principles of construction of somewhat vague contracts which we are prone to forget or ignore. The case was tried on the County Court of Ontario; the Supreme Court of Ontario reversed the first judgment, the Supreme Court of Canada reversed the Supreme Court of Ontario; and the Privy Council in turn reversed the Supreme Court of Canada and restored the judgment of the Supreme Court of Ontario.

No wonder we have a nice point to consider and present to our readers.

The case arose out of a Building Contract.

The first clause provided that in consideration of $3,000 payable in instalments the Contractor would furnish material and perform certain work.

The second clause provided that in certain events

[2] (1921), 3 K. B. 387.
[3] (1896), 2 Q. B. 59.
[4] W. W. R. 1922, Vol. 1, p. IV., p. 250.

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the agreement was to be at an end, and that the Contractor should be paid for services rendered.

The third clause provided "that in the event of the material . . . and labour . . . amounting in value to more than $3,000 then the Building Owner should reimburse the Contractor for the excess." Further in the event of the material and labour being less than $3,000 "then the final payment will be the actual amount expended by the Contractor over $2,500 plus 12½% instead of the last instalment of $1,000 payable under clause."

The action was brought for $3,830 under the last clause. The work and material under the last clause was found to be $7,010 and $3,180 had been paid on account.

The County Court Judge held the third clause was repugnant to the first and dismissed the action. The Ontario Supreme Court said clauses 1 and 3 should be read together; and though it was temporarily reversed by the Supreme Court of Canada, the Privy Council before whom the case went by special leave, restored the Ontario Supreme Court decision.

Lord Wrenbury said if in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause being repugnant, is to be rejected. But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole.

Furnivall v. *Coombs*[5] is an illustration of the former; *Williams* v. *Hathaway*[6] is an illustration of the latter principle.

The Supreme Court of Canada seems to have got rather mixed about repugnancy. But it is quite plain that clause 2 varied clause 1 in a certain event; and clause 3 varied clause 1 in a certain event. Both

[5] 12 L. J. C. P. 265.
[6] 6 Ch. D. 544.

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clauses 2 and 3 were variations by circumstances. Lord Wrenbury distinguished between a contract to do a certain work for a certain sum and a contract which merely provides that in consideration of a certain sum a certain work will be done. In the former the work and price are fixed; in the latter case it might mean and it did mean here that in consideration of $3,000 certain work would be done at a price of remuneration presently defined. Here is his illustration: One farmer says to another, "If you invite me to your Christmas dinner I will make hay for you next summer." That does not mean that the dinner is the price of the hay-making. *Verb. sap.*, I say.

Ultra Vires of Companies.

The *Canadian Bank of Commerce* v. *Cudworth Rural Telephone, Limited*,[1] raises at length a question of immense importance. The case itself was one on Promissory Notes given by the Defendant Company for the construction of a telephone system. The Company was formed with this one object: "the construction, maintenance, and operation of a telephone system."

There was no power for drawing, accepting or endorsing Bills of Exchange or notes, etc.; and the defence was raised that the Company had not the power to give the notes sued on. If it were a trading Company it would have the power by implication; but Judge Bigelow held it was not such a Company; and he cited the authorities in Halsbury, Palmer and two or three reported cases in Saskatchewan affirmative of the general principle stated, that in the absence of an express power, a non-trading Company cannot accept Bills, etc. We do not discuss this aspect of the case at all.

From that he passed to the well-known amendment which has been made to the Companies Act in every

[1] (1922), W. W. R. p. 287.

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Province of Canada in consequence of an interpretation placed upon the decision of the Privy Council in the *Bonanza Creek Case*.[8] That interpretation was that a Company incorporated by Letters Patent had, besides its express powers, an unlimited "capacity" to do just what any individual might do; and so the statutory amendments practically proposed to transform our Companies from Statutory Corporations with restricted powers or objects, into Common Law Corporations with absolutely unlimited powers; and the case of *Edwards* v. *Blackmore*[9] is an affirmance of this view. Mr. Justice Bigelow adopted this case as an authority, though it is opposed to or rather illuminated by *Ashbury* v. *Riche*.[10]

We have discussed the problem involved, in the CANADIAN LAW TIMES (1920)[11]; and though Mr. Justice Bigelow follows *Edwards* v. *Blackmore* we cannot change our opinion that the principle of *Ashbury* v. *Riche* is the applicable and dominant one still.

Our Article in the CANADIAN LAW TIMES (1920, p. 993) clearly combatted the views laid down in *Edwards* v. *Blackmore*. The radical difference between power and capacity was ignored in that case, or rather power and capacity were taken to be synonymous or identical. Nothing could be more divergent; and it is impossible, as we pointed out, to abolish the whole web-work of the Companies Act by a general amendment such as the Provinces have nearly all made to their statutory enactments.

Why should we be encumbered with the Companies Acts at all, if our Companies are now Common Law Corporations? That really is the question. A Common Law Corporation could not be created to-day. It requires a Statute to bring into operation the Prerogative Power of incorporating Companies; and consequently it is the Statute and not the Letters-

[8] (1916), 1 A. C. 566; 10 W. W. R. 391; 34 W. L. R. 177.
[9] (1918), 42 O. L. R. 105.
[10] (1875), 7 H. L. C. 655.
[11] (1920), Vol. 40, p. 993.

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Patent of the Crown that controls and fixes the Corporation's powers. That is they are fixed by the objects of the Company. *Edwards* v. *Blackmore* gave a foist to the opposite view; but it did so because as it seemed very clear now, there was a misapprehension of the real or true meaning of the *Bonanza Creek Case* which had just then been decided.

From that case it is plain enough that a Company's powers are fixed by its own objects; but that if incorporated by Letters-Patent there is inherent in the Company not a "power" to do what it likes, but a "capacity" to exercise its fixed powers in other spheres than within the boundary of the Province of its incorporation. But the inherent capacity imputed to a Company formed by Letters-Patent must not be incompatible with the scheme of the Statute or with the specific objects of the Company itself.

Joint Control of Railway—Which Co. Liable for Negligence?

Bain v. *Central Vermont Railway Co.*[12] is an important question on the divisibility of liability of two different Companies who operated the same line. The two Railways were the Grand Trunk and the Central Vermont Railway. The line of Railway was from Montreal via St. Johns to St. Albans in Vermont. Hedges was a locomotive fireman in the employment of the Grand Trunk. He was killed in the course of his duty at Montreal by being run into by an engine driven by a man named Frost, who was in the service of the Central Vermont Railway Company.

The agreement between the operating Railways stated this:—Each may furnish its mileage proportion of passenger and freight engines and train crews used on joint service between Montreal and St. Albans . . . That each party shall pay the train and engine men employed in the joint service performed by them on its own account, and neither of the parties hereto shall

[12] (1921), 2 A. C., p. 412.

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be responsible to the other for the actions of such joint employees while upon the line of the Railway.

Frost, at the time of the accident, was driving a train on the line, and his negligence consisted in his failing to attend to Grand Trunk signals. The Central Vermont Railway denied liability. The trial Judge held that the deceased Hedges was an employee of the Central Vermont and was their servant and that the agreement between the Railway Companies was *res inter alios acta* only. He gave Judgment accordingly. Before the King's Bench Court this was affirmed, one Judge dissenting; and on Appeal to the Supreme Court of Canada this Judgment was reversed and the view of the dissenting Judge adopted. The Privy Council affirmed the decision of the Supreme Court of Canada and described the judgments as "admirably clear." It is gratifying to see such an expression. But that is apart.

There was no doubt in the case that Hedges was in the employment of the Grand Trunk. Frost was in the service of the Central Vermont Railway. But at the moment of the accident Frost was under the dominancy of the Grand Trunk. He was on its line, and bound to obey its signals; and it was through negligence in obeying its signals that the accident occurred. "These signals were the mechanical expression of the orders of the Grand Trunk, orders which Frost, at the moment, was bound to obey." "At that moment [of the accident] and for the purpose of regulating the speed of the train Frost was under the orders of the Grand Trunk."

Lord Dunedin referred to a case just recently decided and not yet reported: *La Societé Maritime* v. *Shanghai Dock,* and affirmance by it of the principle laid down in *Donovan* v. *Laing*,[13] namely, "We have only to consider in whose employment the man was at the time the acts complained of were done, in this sense that by the employer is meant the person who

[13] (1893), 1 Q. B. 629.

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has a right at the moment to control the doing of the act."

The rule applies if an employee is placed temporarily at the disposal of another, and whether this was voluntary or for consideration.

Liability of Railway for Passengers' Luggage.

In *Sherlock* v. *Grand Trunk Rly.*[14] a valuable question was decided. The Plaintiff, a Commercial Traveller at Hamilton, Ontario, purchased a ticket to Toronto and got an ordinary ticket which contained no conditions or restrictions either on its face or back. After getting the ticket, Plaintiff went to the baggage office and checked her trunk and received a check. There was nothing said to her to draw her attention to the fact that the check was anything more than a mere receipt for the trunk and the Plaintiff herself did not notice that the check did in fact limit the liability of the Railway to $100 unless the value was at the time declared.

The trunk was lost and never recovered. The Railway Company paid $100 into Court. The action was dismissed by Mr. Justice Rose; and the Appellate Division affirmed this. So also did the Supreme Court.

By section 340 of the Railway Act a Railway Company cannot by contract or otherwise, limit its liability in respect to the carriage of traffic unless authorized by the Board of Railway Commissioners; the Board may, by regulation, determine the extent to which the liability may be limited (ss. 2) and it may prescribe the terms and conditions under which any traffic may be carried on.

The Judgment held that a regulation providing that a carrier shall not be liable for loss of or damage to personal baggage caused by negligence or otherwise to an amount greater than $100 unless greater values are declared and extra charges paid at time of

[14] S. C. R. Vol. 62, p. 328.

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checking, is within the powers of the Board and binding upon the passenger even though he has no knowledge of the restriction of what otherwise would be an unlimited liability.

Vide *Robinson* v. *G. T. R.*[15]

[15] 47 S. C. R. 622; 1915, A. C. 740.

B. T.

CHIEF JUSTICESHIP AND PEERAGE.

"The elevation of Sir Alfred Tristram Lawrence to the Peerage is a fitting tribute to a Lord Chief Justice who, though appointed in circumstances not beyond the reach of criticism, has most worthily maintained the great traditions of the office during the few months he has occupied it. It is, too, a fitting tribute to the office itself. Every Lord Chief Justice since the days of Lord Mansfield has, with the exception of Sir Alexander Cockburn, been a peer."—*The Law Journal.*

DIFFICULTIES OF TRUTH-TELLING.

"It is generally assumed that telling the truth is easy, and there is a certain admiration for the accomplished liar which is a tribute to the supposed difficulty of his self-imposed task. In fact it is easy to lie, and extraordinarily difficult to tell the truth, at least in a way to satisfy the formula of the judicial oath, 'The truth, the whole truth, and nothing but the truth.' The unsuccess of lying is due not to the difficulty of fabricating an untrue story, but to the impossibility of creating a world. For while there is one piece of actual fact in existence it will refuse to be built into the edifice of mendacity, and may at any moment bring about the shattering of the liar's airy erection." — *The Justice of the Peace,* London.

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BOOKS RECEIVED FOR REVIEW.

I. The Trustees' Handbook: Including Powers, Duties and Liabilities. II. The two following issued by the Grotius Society: (a) Sully's Grand Design of Henry IV., from Memoirs of Duc de Sully, by David Hogg; (b) Erasmus' Institutio Principis Christiani, by P. E. Corbett.

These books are published by Sweet & Maxwell, London, and may be had from The Carswell Company, Limited, Toronto.

The Handbook on Trustees has been issued at the suggestion of a Trustee who was unable to find a small book containing the information he was constantly requiring; and it is designed for Trustees quite as much as for the Lawyer who cannot always put his hand upon that excellent guide known as Lewin on Trusts. Short of Lewin, this Handbook is indispensable.

B. T.

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The Canadian Law Times.

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EDITORIAL.

Appeals to Privy Council.

It is gratifying to know that the Benchers of the Ontario Bar Association are strongly opposed to the abolition of the Appeal to the Privy Council; and a more able and worthy representative to state their views to Premier Drury and Attorney-General Raney could not have been chosen than Sir Alan Aylesworth, former Minister of Justice.

Why does Mr. Raney persist in his infatuation, the Lawyer, not only in Ontario, but all over Canada, may be permitted to ask?

In the first place it is beyond the competence or power of the Provincial Legislature to abolish the right of Appeal. It is part of the King's Sovereign Prerogative, and not merely the private right of the individual. It is one of the ties still left us between the Sovereign and the subject; and it is a personal relationship rather than an official one. Are the parties to this relationship willing to abolish it? Are they arrayed—the King on one side, and the People on the other; and do they both assent? If so, while the Provincial Legislature is very far from being the proper or adequate instrument, let the Right of Appeal go. But that this is not so, is proved by the fact that every time Mr. Raney makes a fresh sally at destroying the Appeal, promptly a splendid array of adverse opinion starts into activity. A stronger array than the present one was never opposed to him. He ought to learn—at least something!

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It was in 1920 that Mr. Raney first made himself conspicuous by his frantic but futile attempts or proposals to abolish the Appeal by a Provincial Act. He had to abandon his folly then; and we really believed—at least we hoped—the fanatical fire had burned out.

Is the Attorney-General's department scarce of beneficial employment and necessary work? If it is, we can provide, in the rectification of the muddled-up Statutes of Ontario, enough work for Mr. Raney and his staff, for all the time he or they will occupy their places in the Legislative Building. It is only Satan that finds mischief for idle hands to do.

This interference with the Prerogative of the King is beyond you, Mr. Raney; and even if it were within your power, your interference with it has no sanction or authority either from the People or from that branch of the People which is most competent to form an opinion on the wisdom or expediency of your proposal.

I wonder, sometimes, how many Appeals Mr. Raney, K.C., argued before the Privy Council; and if he has a personal grudge for some rather ugly discomfiture in the great Forum. Those who have been there, and those who really study our Law, and the reports of the masterly decisions—great constitutional rectifications and luminous clarifications of almost inextricable complexities—have no doubt that for many a year to come the retention of the Privy Council appeal is essential, if not indispensable, to Canada's rapid growth and evolvement into Sovereign Nationhood. When that great end has been consummated the Appeal to the King in his Privy Council in London will cease. Then Mr. Raney will be glorified as a man who mooted a measure 100 years ahead of time. But why accelerate this unduly?

When the Old Colonies in America revolted, there was nothing that the men who projected them upon the rocks, so much missed or deplored, in their difficult task of establishing and evolving a Republican Government, as the calm judiciousness of the Privy Council in straightening out tangles created in the

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Law by novitiates in the art of Legislation and novitiates in the art of comprehending and dispensing Justice.

The philosophers of the new American Republic have transmitted it on to us as their avowed opinion that the confusion in the Law which ensued upon the revolution, and the absence of a really commanding tribunal to remove this confusion and to clarify the Law, impeded the new Country's development for more than 50 years. It is only now, even the American philosopher of to-day will tell you, that the United States is beginning to feel it has by persistent effort—continuous education—produced a race of Lawyers fit in any way to supply the place of the Privy Council which they long since lost.

Has Canada yet produced a race of Lawyer fit to replace the Privy Council? The question carries its own answer, and Mr. Raney's condemnation also as an irrational faddist.

Natural Resources of the West.

The C. L. T. ought to be proud of itself. It has been the series of articles which appeared in it in 1919 and since upon many occasions, that penetrated and finally rent the armour of dogmatic autocracy under which the Dominion asserted, and for fifty years maintained, the claim that it owned the lands of the West—Rupert's Land and the North-West Territory—out of which Manitoba, Saskatchewan and Alberta were carved. Even then when Provinces were formed, the Dominion withheld the Land and established a Suzerainty all over the Western Provinces. It was an audacious and an atrocious piece of arrogance; and the Dominion Government had neither Law nor common decency nor even honesty to warrant it in twisting, as it did, the Constitution of Canada. Even so late as last Summer a Judge of the Exchequer Court rendered in the West a Judgment in an Escheat case, dogmatically laying it down that the Dominion owned the West and that the Provinces were never given any land when they

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were formed. He got his answer in the C. L. T. of May, 1920, Vol. 41, p. 329, and that was the first thing which forced the Dominion Government to sit up and take notice. The Exchequer Court Judge held the Dominion and not the Province was entitled to the lands of a deceased owner who died intestate and without heirs. I would like to know what sort of a Judgment he would render to-day if he had the chance over again. But that apart. When the Government got this last knock, it was evident the walls of fraud and unconstitutionality were falling around it; and then in a skelter the Legal Department at Ottawa took the opinion of one of the foremost Lawyers at the Bar in England on the tenability or validity of the contention advanced in the C. L. T. as I have stated. That opinion is that the view expressed in those Articles by the present Writer are valid. Without qualification this eminent Lawyer endorses them, and says he believes the Privy Council would unhesitatingly give effect to them.

This accounts for the new attitude of the Dominion Government. Never, till now, would it or did it recede from its asserted ownership. But now that it has been dispelled, the clattering politicians who have long messed the iniquity are once more buzzing around in violent efforts to save for the speculators, the Political hirelings, and others of the ilk the lands granted to them by the Dominion.

These people never gave anything for the land and have no title to it; because the Dominion itself had no title or right to make the alienation. Nor had they any title or right to make alienations of Western Lands to Syndicates of various kinds, and to Eastern Railways which never can possibly pass through the West. Nor had it either power or right to exempt Railway lands from Provincial Taxation.

It is now the aim to legalize all this illegality in which the Provincial Governments one after another were connivers. Having been driven out of one cesspool they are diverting attention by plunging into another.

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The Parliament of Canada cannot legalize its own wrong, nor can it by any Act take from the Dominion Government the right conferred upon it to administer these lands in the interest of the Dominion. This imposition forms a part of the constitutions set up by the Parliament of Canada for the Provinces of Manitoba, Saskatchewan and Alberta; and the Parliament of Canada is precluded or prohibited from altering or varying those constitutions, however illegal and contrary to the B. N. A. Act they may be.

The Imperial Parliament must be invoked; and it is there that redress must be sought in the last resort by the People of the Western Provinces.

All our Articles have urged that the issue involved between the Dominion and the Provinces is not a political, but purely a legal one, resting on the Constitution; and even yet its determination by the Privy Council should precede any attempt to deal with it by the Parliament of Canada, whether it now abandons or not its 50 years of insistent claim to own the great areas of Ruperts Land and the N.-W. Territory.

Bankruptcy Act.

It is now more than a year ago since we discussed some of the twists in the carrying out of the Bankruptcy Act. *Vide* our Article in the C. L. T. 1921, Vol. 41, p. 96. It could bear repeating to-day as the wrongs there exposed, though suppressed for a time, are again becoming rampant. It is the fault of those in whose interest the first exposure was made. When the ring was cleared every bantam flew in, and, flapping its wings, began to crow. Their din confounded everything and the real fighters retired. Such has been the history of many a noble cause. If the fight is to be renewed the bantam must be kept to its own crail where it may cackle to its heart's content.

The Benchers of the Provinces ought surely to have some obligation in safeguarding the rights of Lawyers whom they represent; and the Law Societies ought to move out of their dull routine of holding meetings, and examinations; and of issuing Licenses to practise.

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In the West the Bankruptcy business is to a large extent being monopolized in Winnipeg. It is there where, as a general rule, most of the creditors are; and the system has sprung up of having compositions, arrangements and extensions of time with Debtors in all parts of the West—Saskatchewan and Alberta for instance—carried through by meetings held in Winnipeg; and afterwards approved by the Bankruptcy Judge there.

It may be that many a time a meeting can be more conveniently held for all parties in Winnipeg; but the Manitoba Bankruptcy Judge could have no jurisdiction over a Bankrupt or Debtor in Saskatchewan or Alberta; and it is simply farcical to ask him to do such a stultifying thing as approve of any proceeding in Bankruptcy relating to a Debtor residing in Saskatchewan or Alberta. The sooner this is stopped the better. *Verbum sapientibus*; and we trust to hear no more of the matter. If we do we shall descend to particulars.

The Trusteeship is also once more being monopolized; and Section 15, Clause (1) is being abused.

When in February, 1921, we assailed this, certain guarantees were given as to the future; but these have weakened with time, and some at least have forgotten them.

This clause should have been deleted as we urged at the time; and one Trustee should not be replaced by another except for cause shown to the Bankruptcy Judge.

We are rushing for the Press now; and wish to give a strong invitation to our readers to send the Editor notes of facts relating to the working and operation of the Bankruptcy Act in any part of Canada.

B.T.

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ARE JOINT STOCK COMPANIES COMMON LAW CORPORATIONS?

By Bram Thompson, M.A., Barrister, Regina.

Vital, momentous and far-reaching in its effects on the Commercial and Financial affairs or enterprises of Canada is the question:—

> WHETHER THE CORPORATIONS CREATED OR ESTABLISHED UNDER THE AEGIS OF THE DOMINION AND PROVINCIAL LAWS ARE STATUTORY ORGANISMS WITH RESTRICTED OBJECTS AND POWERS, AND WITH LIMITED LIABILITY ON THE PART OF INVESTORS; OR WHETHER THEY ARE COMMON LAW CORPORATIONS WITH UNLIMITED POWER TO DO WHATEVER THEY LIST SO LONG AS THEY AUTHENTICATE THEIR ACTS BY THE SYMBOL OF A COMMON SEAL.

Until quite recently such a question would have appeared chimerical and beyond the range of discussion in this sweltering world of frenzied activity. To me the conception of our Joint Stock Companies being Common Law Corporations is still chimerical: it is the quintessence of absurdity. That, however, is not now the issue; and I must admit that, if recent judicial interpretations of our Companies Acts are a correct reflection of the Law, the Statutory Company with its Solonic restrictions has been already transformed or metamorphosed into that irrational, irresponsible, and uncontrolled entity known as a Common Law Corporation; and the investor at any moment may either be despoiled of his money or see it employed without even the right to protest, for purposes completely different from, or even opposed to, those contemplated and stipulated when he made his investment.

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It is incumbent upon us to examine this phenomenon in our Law. We have to some extent already done so in the C. L. T. for December, 1920 (Vol. 40, p. 993); and we would refer the reader to the views there expressed both in favour of the existence and of the non-existence of the principle of *ultra vires* in our corporate Companies and in the Law which controls them.

At the time, I believed the Article referred to would have created an earnest discussion; and that opinions clarifying the obscurity would have flowed in from Lawyers all over Canada whose practice brought them in close contact with Company Law. I was disappointed; and after a time I consoled myself with the belief that the spectre of the Common Law Corporation, which for a time had begun to strut upon the stage, had vanished and would be seen no more. But again I was disappointed; for quite recently it received at least a nod of judicial recognition.

We must therefore either prove that this is no more than a gaunt spectre or hobgoblin and annihilate it; or we must recognize that it is a reality, and is in fact a reimbodiment in statutory form of an autocratic appanage of the middle ages, which England herself passed into the heap of *disjecta membra* when clearing her glorious route to constitutionality through the Sovereignty of Parliament: and then having recognized this we must ourselves see it is promptly discarded by the same authority that, with reckless daring, imposed it upon us in the 20th Century.

Our examination had better proceed historically; and we go at once to the origin of matters pertinent to us. We find them in the celebrated case of the *Bonanza Creek Gold Mining Company Limited* v. *The King*, with most of the Provinces as Interveners. It was finally decided by the Privy Council, and is reported: 1916 A. C., p. 566.

Those who are really interested in the problem involved would benefit by reading the full report of the proceedings and arguments before the Privy Council itself, as set out in a Book published in 1917 by the

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Carswell Company, Limited, Toronto. I make this recommendation though I feel that some of the hypotheses and conundrums and stray *obiter dicta* in the course of the argument have been mistaken for parts of the judgment, a large part of which, itself, was *obiter dicta,* and is neither Law nor is it binding either on us or on the Privy Council. It may be necessary to recur to this fact when we come to discuss particularly the ensuing legislation in our Provinces.

Now, what was the Bonanza Creek Case?

It was simply the case of a Mining Company established in Ontario under the Companies Act of that Province, which found itself operating in the Yukon. It had been registered there under the Laws of that Territory whose Legislature and Government, unlike those of the Provinces, are subordinate to or delegates of the Dominion, or rather of the Parliament and Government of Canada.

The Company in the Yukon had made a beneficial contract with the Dominion Government in reference to some Mining Rights, and to evade performance of the contract the Dominion Government raised the question of *ultra vires* against the Company, claiming that the contract was void, as the Company had no power or right of operating or of making contracts in the Yukon or anywhere else outside the territorial area of Ontario.

The case in the Courts of Ontario was decided in favour of the Dominion and against the Company, on the authority of *Ashbury* v. *Riche,* 7 H. L. Cas. 653; 44 L. J. Ex. 185, and the Supreme Court of Canada affirmed this decision by three to two: *Vide* 50 S. C. R. 534.

An Appeal was made to the Privy Council; and then the previously-ignored fact that the Company's incorporation had been effected by Letters Patent issued by the Lieutenant-Governor was made to play a conspicuous part.

The Companies Act of Ontario authorizes the Lieutenant-Governor to issue Letters Patent incorpor-

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ating Companies for the purposes set out in a memorandum of Agreement. This memorandum is an Agreement between the original incorporators, and it serves the purpose of, and contains particulars similar to those set out in, the Memorandum of Association which is the basis of incorporation in most of the other Provinces where the system established by the English Companies Act is adopted and closely followed. It is registration of the Memorandum of Association which incorporates the Company whose powers correspond with the objects or purposes set out in it. The Letters Patent in Ontario serve the same purpose of incorporation or of imparting vitality to the entity created under the Companies Act.

In the Bonanza Creek Case, the Letters Patent were held by the Privy Council to have conferred upon the Bonanza Creek Gold Mining Company a "capacity" to acquire the right in the Yukon to carry on its operations there upon complying with the *lex loci*, that is, by procuring a License for that purpose under Section 2 of the Consolidated Ordinance of the Yukon Territory. It was held by the Supreme Court as well as by the Privy Council that the Company had when the disputed contract was made complied with this requirement. But the Supreme Court held that such registration was ineffectual as the Company had no rights and could acquire no rights outside the ambit of the territorial boundary of Ontario; whereas the Privy Council decided the contrary, as I have just stated, and that the Company had a status in the Yukon and had the power to make the contract (a contract entirely within the ambit of its original constitution), which the Dominion contended was *ultra vires* and void.

The method of incorporation by Letters Patent accounts for the divergence of view between the Supreme Court and the Privy Council. The former regarded the Bonanza Creek Company as a purely statutory company limited in its scope to its stipulated purposes, and amenable to the principle of *ultra vires* as expounded in *Ashbury* v. *Riche, supra*: whereas the

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Privy Council held the Prerogative right of incorporating Companies was intact and inherent in the Lieutenant-Governor, and that the Bonanza Creek Company, though limited in the powers derived from its incorporation to the Province of Ontario, had in virtue of its Letters-Patent Charter some of the "capacity" at all events of a Common Law Corporation, and particularly the *capacity to acquire the right* to carry on its operations outside the Province of Ontario.

Lord Haldane in his judgment said that the constituting statute might confer this extra-territorial capacity either expressly or by necessary implication; and that either would be effectual. "The language," he said, "may be such as to show an intention to confer on the Corporation the general capacity which the Common Law ordinarily attaches to Corporations created by Charter."

As a consequence of this decision the following amendments were made to the Companies Act:

(*a*) Ontario, 1916, ch. 35—

"Every Company . . . created by or under any general or special Act of this Legislature shall unless otherwise expressly declared . . . have and be deemed from its creation to have had the general capacity which the Common Law ordinarily attaches to Corporations created by Charter."

(*b*) Manitoba, 1917, ch. 12—

"Every Company . . . shall have . . . the capacity of a natural person to exercise its powers beyond the boundaries of the Province . . . and have . . . the general capacity which the Common Law ordinarily attaches to Corporations incorporated by Royal Charter under the Great Seal."

(*c*) Saskatchewan, R. S. S., ch. 76—

"Every Company . . . shall . . . unless the contrary intention is expressed . . . have . . . the capacity of a natural person to accept extra Provincial powers and rights . . . and unless the contrary intention is expressed in a Special Act or Ordinance incorporating the Company or in a Memorandum of Association thereof . . . such incorporation shall so far as the capacities of such Companies are concerned have . . . the same effect as if the Company were or had been incorporated by Letters Patent under the Great Seal."

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(*d*) British Columbia, 1918, ch. 18—

"Every Company . . . shall have . . . the capacity to effect outside the Province its objects or purposes and to accept powers and rights in respect thereof from any lawful authority outside the Province."

These amendments, with the exception of the one made in British Columbia, must be declared to be slovenly, inexpert and unscientific.

All that was meant to be effected by them was to confer upon Companies which owed their existence entirely to a Statute the same capacity of acquiring an extra-Provincial right of operating their prescribed business as the Privy Council in the Bonanza Creek Case had held was inherent in a Company incorporated by Letters Patent. The intention was to equalize all Companies by giving them all this newly revealed capacity. It was not meant surely that the whole fabric and framework of the masterly structure of joint-stock, limited-liability companies which was the result of 70 years or more of expert legal and commercial development in the United Kingdom should be demolished by a few words added as amendments to the Companies Act; and that all Provincial Companies should become Common Law Corporations *de facto*.

It was not surely the intention of either the Legislature of Ontario or that of Manitoba that its Companies should be instantly and completely freed from the limitations of its Companies Acts, and be invested with "the general capacity which the Common Law ordinarily attaches to Corporations created by Charter." Nor was it the intention, surely, of the Saskatchewan Legislature to effect very much the same thing by a slight variation in phraseology.

The draughtsman of any of these amendments could by a word or two have obviated the terrible imbroglio in which Companies find themselves to-day, and in which, especially, Lawyers advising Companies and Investors in them find themselves every day. If Manitoba and Saskatchewan had stopped at the end of the first clause of their amendments they would

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have accomplished a valuable work. The last clause stultifies and contradicts everything in the rest of the Acts relating to powers, capacities, rights, limitations and restrictions; for the Common Law Corporation was an absolute entity while it endured.

The predicament created is an insoluble dilemma which is becoming more mystic by the Judicial interpretations of these irrational and fantastic additions to our Companies Acts.

It does not seem as if the draughtsmen of the Legislatures knew what they were doing when they used phrases charged with high explosives, as if they were linguistic baubles. At all events ruin is around them now; and many Companies and hundreds of investors are in confusion, if not in imminent jeopardy.

What is a Common Law Corporation whose "general capacity" these Legislatures were so anxious to confer upon what were intended to be strictly statutory Companies?

I should, I think, speak of the Common Law Corporation in the past tense; for it has ceased to exist or at least to be created for any Commercial, Financial or Business purpose. I have already stated in the Article referred to published in December, 1920, that, except under the authority of an Act of Parliament, the King himself could not to-day create a Common Law Corporation or issue a Letters-Patent Charter incorporating any Company of a Commercial or Business Character. He might as an Executive act of State, with the consent of the Privy Council or the Cabinet or Government, form a Common Law Corporation like the Hudson Bay Company as a pioneer explorer of some new region; but without the authority of Parliament he could not establish any Company affecting the rights or liberties or privileges of the people. The creation of such Companies belonged to what was the legislative prerogative of the Sovereign; and this part of the prerogative has passed to, and been reposed in, Parliament ever since the seventeenth

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century. So far as the King *solus* is concerned it is abrogated.

The Common Law Corporation was an artificial individuality consisting of a number of persons incorporated together as an entity for a purpose, but with unlimited power and capacity to pursue any other purpose without restraint or interference so long as the Crown did not see fit to cancel or recall the Charter. The Members of the Common Law Corporation had no personal liability whatever. None was imposed upon them by the Charter, and none was ever imposed upon them by Law; and yet the Corporation had the power and capacity to enter into any contract, whether pertinent to its original purpose or not, and was bound by it; and could neither plead nor have pleaded against it the principle of *ultra vires* so long as its act or contract was authenticated by the Corporate seal.

It was a personality in that it could change its location as it wished, just as it could shift the purposes or objects of its existence. It was amenable to no one but the Crown and all that the Crown could do with it was to cancel or recall the Charter on the ground of its gross and wanton violation. The Company's *power* was as unlimited as that of the ordinary individual. Its *capacity* was coterminous with its power, and similarly unrestricted. There was no such thing as making the Directors of it or its Governor or Members liable for anything, however fraudulent or dishonest the operations of the Corporation might have been. It was in everything, except in being a Corporate Body, the exact antithesis of the joint-stock, limited-liability Company which is the creature of our Statute Law to-day.

What is the object or intention, then, of conferring the "capacity" of the Common Law Corporation on our Statutory Companies? What is the effect of such an incongruity? The only capacity of the Common Law Corporation that the Legislatures wanted to attach to their Statutory Companies was the capacity

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of acquiring extra-Provincial rights—of going and carrying on elsewhere their statutorily prescribed business upon securing the license of the Governmental authority in the new location.

Instead of that the Legislatures in Ontario, Manitoba and Saskatchewan (and I do not know how many other Provinces), attached to their Statutory Companies the "general capacity" of the Common Law Corporation. What does that mean?

I will now state what, so far as I know, the Courts have said that it means.

In the case of *Edwards* v. *Blackmore*, 42 O. L. R. 105, the Appellate Division of the Supreme Court decided that, by virtue of the amendment I have already set out, the Defendant Company in an action upon a Promissory Note given for a purpose wholly outside the scope of the objects of its incorporation—

"was endowed with all the capacity which a Corporation created by Charter had at Common Law—that is almost unlimited capacity to contract; statements in the Letters Patent defining the objects of incorporation did not take away that capacity; and even express restrictions in the Charter did not take it away but should be treated as a declaration of the Crown's pleasure in reference to the purpose beyond which the capacity of the Corporation was not to be exercised, a breach whereof gave the Crown a right to annul the Charter."

I quote these words from the head-note of the Report.

Without the amendment, it is abundantly manifest the Plaintiff would have failed as the defence of *ultra vires* would have been irresistible: the company had no authority either to make the Promissory Note or to enter into the contract of liability which underlay it. The Company was formed to acquire land and build houses, etc.; and the Promissory Note was given on account of the purchase price of machinery and patent rights for the manufacture of machines for pressing clothes. Before the fateful amendment of the Companies Act the action would have been scouted out of Court.

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This case was followed in *Canadian Bank of Commerce* v. *Cudworth Rural Telephone Co.*, 1922, W. W. R., Vol. 1, p. 287.

That too was an action on a Promissory Note. The Defendant Company was not a trading company and had neither a specific nor an inferential authority to draw, accept, or endorse Bills, Notes or Negotiable Instruments.

Judge Bigelow said in deciding:—

"It is a common impression that a non-trading Corporation such as this was has not the power to make Notes, and this proposition is established by abundance of authorities. . . . But it is contended . . . that since 1917 when our legislature amended the Companies Act so as to give every Company the same power as a Company incorporated by Letters Patent under the Great Seal such a Company now has power to make Notes. . . ."

"The Decision of *Edwards* v. *Blackmore*, *supra*, was a decision of the Appellate Division of the Supreme Court of Ontario in which the judgment of the trial Judge, Masten, J., was affirmed by Lennox, J., and Rose, J., although Meredith, C.J.C.P., dissented. I think I should follow this decision."

I cite these cases to show how the doctrine that our Statutory Companies are veritable Common Law Corporations is finding vent and is permeating our Courts.

Our legal system is so dependent upon precedent that we can only safeguard our rights by challenging every decision subversive of justice and equity; and therefore it is we challenge *Edwards* v. *Blackmore*.

The dissenting decision of Chief Justice Meredith is worthy of all commendations, and it reflects and states the Law. It should be the beacon light in future interpretations, and the majority opinion of the Court should be regarded as a false lure—one that leads us to shun Scylla with the inevitable result of landing us in Charybdis. There we are now. Who will navigate us into the placid waters of common sense?

The Ontario Appellate Court had an ideal opportunity of giving a rational interpretation to a very irrational enactment. It seems to have lost the sheet anchors of construction so familiar to every Lawyer since the time of Coke—What was the Law; what was its defect; and what was the redress or remedy

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intended to be provided. What the Bonanza Creek Case showed was wanting to a purely statutory Company, was the capacity of acquiring extra-Provincial rights to carry on its business outside the incorporating Province. Lord Haldane in his judgment made it clear that a purely statutory Company had not this capacity; and went on to show how such a capacity might be conferred. Among other things he said:—

"The Statute may be in such a form that a new power to incorporate by Charter has been created directed to be exercised with a view to the attainment of, for example, merely territorial objects, but not directed in terms which confine the legal personality which the Charter creates to existence for the purpose of those objects and within territorial limits.

"The language may be such as to show an intention to confer on the Corporation the *general capacity which the Common Law ordinarily attaches to Corporations created by Charter.*"

Lord Haldane was here merely discoursing upon how a Statutory Provincial Company might possibly acquire an extra-Provincial right of operating; and nothing more. He was not laying down or stating Law.

But these fateful words so innocently used found their way into the Ontario and Manitoba amendments to the Companies Acts; and what a catastrophic result!

They could never have been used with the intention of doing what the Appellate Court of Ontario says they have done—demolished the Statutory Company; and what is more they were clearly susceptible of the rational construction that what they meant, and were intended to mean, was exactly what Chief Justice Meredith says they do mean, namely, that they invest the Statutory Company with the "general capacity" of a Common Law Corporation for the purpose obviously, and the purpose only, for which the amendment was made—the purpose of giving the Provincial Company power to acquire extra-Provincial rights. The other construction is strained. It takes no notice of the cause of the amendment, and practically rules that all the precise and definite restrictions and limita-

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tions of the Companies Act are abolished by a general amending clause; and that the Companies are now Common Law Corporations with all their "capacities."

It is revolutionary if it is good law. But is it? That surely is the question.

The amendments in all the Companies Acts only conferred, at any rate, "capacities." What about the powers? For it is the powers of the Company that underlie and give force to the capacity.

It was "powers" that the majority of the Ontario Court discussed in their judgments, and they used the words "capacity" and "power" interchangeably as if they were synonymous.

The Common Law Corporation had "capacity" to do anything, because, and only because, it was a complete artificial creation *sui juris*, and with all the freedom of action—all the power—of an individual man. This freedom of action was its power; and the capacity coincided with the power. Their coincidence, perhaps, leads to this confusion, though they are as distinct as any two conceptions of law can be. One can exist without the other; though one without the other is virtually a nullity.

The two combined constitute or determine the status of a Common Law Corporation; and the status of a Common Law Corporation has not been conferred on our Statutory Companies. The status may be, as Lord Haldane says, something "resembling" it. But there is all the difference between the two that there is between a real man and a wax figure "resembling" him.

We must consider power and capacity apart to get a rational meaning for the amending Legislation.

Power in a Corporation or artificial person corresponds with the right of an ordinary individual.

Power is the Right to do or not to do something—the right to own; to buy or sell; or to carry on some business operation.

Capacity is the faculty of acquiring or using that Power or Right, and of implementing it by contracts within the limits of the Law.

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The infant or imbecile may have the right to property; but he is without capacity to dispose of it.

The power of a Statutory Company is conferred by the statute, and its capacity is co-extensive with the power.

Power may by implication create a capacity; but capacity can not create power or right. All it can do is to "acquire" a power or right. Most men are born with capacities to be millionaires: but they are not millionaires till they first acquire the millions.

The Common Law Corporation had a general capacity simply because it had a general power.

The Statutory Company has its powers, and its capacities as well, defined by the creating Statute. It has nothing else. Its powers are not enlarged, or even touched, by the amending clauses of the Companies Acts in any of the Provinces. All they do is to give "a general capacity such as ordinarily attaches to a Common Law Corporation." This amendment is governed first by the B .N. A. Act, and next by the Statute itself which constructs, not a complete artificial entity, but one limited to prescribed spheres beyond which it cannot go except by routes laid down in the constituting Act. This general "capacity" does not create a general "power" to operate upon; and it could not override the particular capacities of the Company—the limitations and restrictions—set out in the Statute itself. All it could do would be to operate on the existent statutory powers or rights of the Company in some exigency for which a statutory capacity was not already provided. The statutory power and statutory capacity of a Provincial Company are limited to the Province; but this general capacity enables the Provincial Company to acquire the right to operate its statutorily defined powers in other arenas. It does not create the right itself to operate ultra-Provincially. If it did—if a Letters-Patent Charter makes a Common Law Corporation—it was futile for the Privy Council to discuss with so much finesse the question of whether the Bonanza Creek Gold Mining Company had *acquired*

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the status of a registered Company in the Yukon Territory by the *Lex Loci*. Here we see the difference between capacity and power. If the Company by virtue of its Letters-Patent Charter had the general power of a Common Law Corporation, registration under the *Lex Loci* was unnecessary. It had the right, and had not to acquire it.

The purely statutory Company which owes its origin entirely to the statute and the filing of a memorandum of association setting out its objects, has none of its powers, none of its objects or purposes, extended or altered by the amending words of the Companies Act conferring on it "the general capacity of a Common Law Corporation." Within the Province of its constitution it is limited to its statutory powers and statutory capacities; and this general capacity could only operate upon the statutory powers at points where no specific capacity is set forth in the statute.

Now let us turn to the Company which is incorporated by a Letters-Patent Charter issued pursuant to a Statute. Such Company is emphatically a Statutory Company.

The Letters Patent are not the Prerogative Letters Patent of the Sovereign; and the creature which they create is not a Common Law Corporation. It is not a complete entity; and it is not a perfect artificial individual *sui juris*.

The Company is formed and moulded by the Statute. Its objects or powers are circumscribed and defined in accordance with the Statute, and its capacities in reference to those objects or powers are defined by the Statute. Beyond them *mero motu* it cannot go; and if it desires to extend them in any way it has to comply with the provisions of the Statute.

It is this creature or creation—limited, restricted and circumscribed — that is presented to the Sovereign's Representative who imparts vitality to it, just as it is, by issuing a Letters-Patent Charter. It comes forth then with all its limitations—power, capacity, and liability to none of which was the Common Law Corporation subject.

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The Charter does not change this creature or enlarge its powers as defined in the Statute; and the only thing it does, beyond the Statute, is to give such a Company a capacity to acquire a right to operate beyond the Province; and why? Because the Province was incapable directly of conferring the right to operate outside its territorial boundary. There is, however, no antagonism, here, between the Statute and the Charter. The Charter supplements the Statute.

If the Statute stated that a Company thus formed should not acquire extra-Provincial rights, the prohibition would prevail and the Letters Patent could confer no contrary power or capacity; for as Lord Haldane himself says in the Bonanza Creek Case: "No doubt the grant of a Charter could not have been validly made in contravention of the provisions of the Act." If it could not even contravene, it surely could not over-ride or completely demolish the Statute as the ruling in *Edwards* v. *Blackmore* clearly assumes that it does.

The Charter could not enable the Company to carry on business which the Statute did not authorize or rather which the Statute prohibited. Nor could it empower the Company to extend its operations in any way contrary to or at variance with the provisions of the Act, or with the scheme or purposes of the Act.

The Letters Patent subserve but do not dominate the Statute.

All the Companies Acts provide for extending a Company's operations beyond the original scope or sphere. The method of, or capacity for, doing this is provided: so that the clear implication is a prohibition to carry on any business except the originally defined business, or some business acquired, or added to its original operative powers, in accordance with the prescribed terms of the Act. All this is not and cannot be changed or affected by the Letters Patent Charter.

Lord Haldane himself says: "If validly granted, the Charter confers on the Company a status resembling that of a Corporation at Common Law *subject to*

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the restrictions which are imposed on its proceedings." That is, subject to the Statute with all its limitations on powers and capacities, the Company constituted by a Letters Patent Charter issued pursuant to a Statute has a status *resembling* a Common Law Corporation. "There is nothing in the language used, for instance, which would preclude such a Company having an office or branch in England or elsewhere in Canada." This, too, is Lord Haldane's own language; and the clear inference from it is that if there had been such language in the Statute the Charter could not prevail over it.

I find that further analysis of this subject must be continued in a subsequent issue; and I conclude for the present by referring to *Ashbury* v. *Riche,* 7 H. L. C. 653; 44 L. J. Ex. 185, where it is laid down that the rights of a Company incorporated under the Companies Act are limited to the objects or purposes specified in the Memorandum of Association. The Company only exists for those objects or purposes, and any act done or contract made by the Company is an attempt to extend them, or which is at variance with or goes beyond them, is *ultra vires* and absolutely void and incapable of ratification. The Memorandum cannot be changed. The reason for that is that it is the basis on which the members agree to incorporation as a joint-stock, limited-liability Company. It is veritably a partnership with limited rights or powers and limited liability; and it would be vicious to read into the capacities of such a Company, years after it was formed, the "general capacity of a Common Law Corporation" enabling it to violate and disregard every statutory limitation and restriction. Yet this is what the amendments of the Companies Act pretend to do, and have done successfully, if *Edwards* v. *Blackmore* is a correct interpretation of them.

I say that Companies incorporated by Letters Patent issued in pursuance of an Act of Parliament are in precisely the same position as is a Company within the four walls of the Act itself—by the regis-

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tration of a Memorandum of Association, which is no more and nothing other than an Agreement among the incorporators.

A similar Memorandum is used in Ontario where the final act of incorporation is done by the issue of the Letters Patent; but the Memorandum is there called an Agreement.

That Companies formed in this way are essentially Statutory Companies, I quote Lord Lindley in *Elve* v. *Boyton* (1891), 1 Ch. (C.A.), p. 508:—

"Now the history of this Corporation is this. It was created in 1720 by a Charter from the Crown which itself was granted pursuant to the provisions of an Act of Parliament. Now consider for a moment what the Crown by its prerogative could do and what it could not do. It could . . . incorporate any number of persons who assented to be incorporated and . . . it could give them power to sue and be sued, to use a common seal, to make by-laws, etc. But it was not in the power of the Crown to . . . incorporate these persons so as to make them liable for the debts of the Corporation.

"What does this Act of Parliament do? It empowers the Crown to grant Charters of a particular kind—Charters which the Crown could not grant apart from this Act of Parliament—Charters of incorporation to persons who should be liable to calls, among other things.

"Now is this Corporation incorporated by Act of Parliament? It is said no; it is incorporated by Charter. The answer is, it would have been impossible without the Act of Parliament to create such a Corporation by that Charter or any other Charter."

This case arose under 6 Geo. IV., ch. 91, which first authorized the constitution of Companies by Letters Patent issued pursuant to the Act and for its purposes. It was repealed and replaced by the Letters Patent Act, 7 W. IV. & 1 Vict. c. 78, which provided for the issuing of Letters Patent for Companies or bodies of persons.

The Company formed under this Act had an Agreement under Seal, specifying the name of the Company, the shares, the names of members, nature and place of business, etcetera, very much as the Memorandum of Association or the Memorandum of Agreement does under the existing systems in Canada. It was a veritable partnership, just as the Joint Stock Company today is a veritable Partnership, and not merely a con-

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glomerate entity; and apart altogether from the provisions of the constituting Statute the old Company was, as the limited liability Company now is, controlled by the law of partnership. The members control it; and the corporate entity could not enter upon new business or make contracts therefor in the corporate name binding upon the members or the Company. The Letters Patent subserved the Statute, and did not confer the status or the powers and capacities which appertain to Common Law Corporations formed by Prerogative Letters Patent at Common Law; but only conferred the rights and privileges—powers and capacities—set out in the Letters Patent and in the Statute under which it issued.

It was in other words a statutory Company, and for the interpretation of its powers and capacities the principles laid down in *Ashbury* v. *Riche, supra,* would apply as those principles were later expounded and clarified by Lord Blackburn in *Attorney-General* v. *G. E. Railway,* 5 App. Cas., p. 481.

The Letters Patent in all these cases are statutory instruments, and are regulated by statutory and not prerogative rules. There is no prerogative element about them, except the Seal which is affixed at the instigation of a Statute, and for the purpose of a Statute.

I submit therefore that when the amendments of the Companies Acts were made, the Companies in the various Provinces were all, however formed, Statutory Companies; and their objects were defined and fixed by the constituting instrument—the Memorandum of Association or Agreement, the Statute or the Letters Patent. The Letters Patent and other accoutrements of the incorporation were the instruments of, and subservient to, the Statute. The Letters Patent could confer no power or capacity at variance with, or contrary to the Statute. None of these Companies, however formed, had any of the powers or capacities of a Common Law Corporation or of a Corporation constituted solely by Prerogative Letters Patent, and

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none of them could extend, alter or vary their objects, purposes, powers or capacities, except in accordance with the Act under which they were constituted, or under which their Letters-Patent Charter was issued.

The "general capacity" conferred upon these Statutory Companies by the amendments of the Companies Acts could not, and did not, transform them into Common Law Corporations. It did not enable them to do what previously they were prohibited from doing; and the only effect it had, or could have, was not to over-ride old prohibitions, restraints, powers or capacities under the Statute, but to operate, harmoniously with the Statute, at some place in the Company's powers where there was no specific capacity provided by the Statute. Where something was prohibited, or where a specific statutory capacity existed, the general capacity was, and is, entirely inoperative.

This is the effect which the Privy Council held in the Bonanza Creek Case the Letters-Patent Charter really had. It had, they held, an element of individual capacity which pertained to a Prerogative Charter, and which was not repugnant to, or at variance with, the restrictions of the Company's statutory powers and capacities; and it was this element of capacity that enabled the Company to "acquire" extra-Provincial rights of operating its powers.

The general capacity conferred by the amendments of the Companies Acts had, and could have, no other effect than this; and the ruling in *Edwards* v. *Blackmore* that practically this general capacity made the Statutory Company a Common Law Corporation is contrary to Law and to the just and true interpretation of the Companies Acts: and the case of *Ashbury* v. *Riche* still governs, and contains the principles which control our Joint-stock, limited-liability Companies under the Companies Acts of the various Provinces of Canada.

BRAM THOMPSON.

Regina, 13th March, 1922.

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PURCHASE FOR VALUE AND ESTOPPEL.

By Henry W. Ballantine.

*Continued from February Issue.**

IV. Rationale of Doctrine that Legal Title Prevails over Equities.

The true reason for the effect of *bona fide* purchase in cutting off "equities" is said by Langdell and Ames to lie in the nature of equitable rights. According to them, equitable rights are in essence only personal claims. If, therefore, A., trustee for B., transfer the property to C., B.'s equitable right and remedy to follow the property will be gone, unless C.'s conscience is charged with B.'s claim; *i.e.*, unless he have notice of it or take without value. But if C. took the title in good faith and for value, with no reason to know of B.'s equity, then there is no ground to charge the purchaser with B.'s personal claim as a constructive trustee.[73]

Ames regarded the doctrine as based on a self-evident and far-reaching principle of natural justice. There must be some basis in honesty and natural justice to impose a constructive trust on the purchaser if he acquires a title either legal or equitable.

"A decree against a *mala fide* purchaser or a volunteer is obviously just; but a decree against an innocent purchaser who has acquired the legal title to the *res* would be as obviously unjust."[74] Hence follows his proposition:—

"A Court of Equity will not deprive a defendant of any right of property, whether legal or equitable,

* This admirable article deals with Canadian as well as American and English Case Law on the subject discussed.—B.T.

[73] Langdell, Summary of Equity Pleading 90; Langdell, Survey of Equity Jurisdiction 6; Ames, Lectures Legal History 253; Bogert, Trusts 513.

[74] Ames, Lectures Legal History 76, 272. Note: Ames does not explain why it is just or unjust. In case of a trust, this might be put on the ground that the trustee represents the *cestui* and is clothed with apparent absolute power to convey.

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for which he has given value without notice of the plaintiff's equity, nor of any other common law right acquired as an incident of his purchase.'"[75]

It is historically true, as Professor Williston says,[76] that "every equitable right is primarily personal," that is, "it binds primarily a particular person and binds others only when their relation to that person is such that in conscience they should be subject to his duties." The maxim that equity acts *in personam* means that equitable rights are obligations or claims, "directed primarily against one person, and secondarily against those who stand in no better position, [that is, donees and purchasers with notice]." An equitable right to property results from the specific enforcement of an obligation such as a contract or a trust against all who are justly subject to it.[77]

The doctrine of *bona fide* purchase for value, however, does not necessarily depend upon the theory that all equitable rights are merely rights *in personam*. Rights *in rem* may also, in many cases, be cut off and defeated by *bona fide* purchase. Though legal title is ordinarily conceived of as good against all the world, yet it too has its limitations. As Professor Williston says, the reason why an innocent purchaser of goods from a seller in possession is protected at law is no doubt fundamentally the same reason which has led equity to protect a *bona fide* purchaser from prior equitable claims.[78]

The recording acts furnish the best illustration of the defeasance of legal titles in a manner which bears analogy to the defeasance of equitable titles. The legal title of a purchaser of real property is made defeasible by subsequent sale or mortgage to an innocent purchaser, where the instrument of transfer is not duly recorded in order that one may deal in reliance on the public records. On the other hand, one who has only

[75] Ames, Lectures Legal History 254; Compare Cook, 30 Harv. L. Rev. 476; Jenks, The Legal Estate, 24 Law Quar. Rev. 142, 154.
[76] 30 Harv. L. Rev. 97.
[77] See 1 Williston, Contracts, sec. 446a.
[78] 1 Williston, Contracts, sec. 446a.

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an equitable right in real estate may, by recording his contract, protect himself against the world.

It is said by Professor W. W. Cook:—[79]

"The truth seems to be that the doctrine [of *bona fide* purchase for value] as we have inherited it is the result of various more or less clear or confused ideas of expediency, justice and supposed logic."

Its precise limitations may be artificial and inconsistent with the principles of policy and natural justice on which it is based. It is well, therefore, to inquire into the real reasons back of the rule governing the rights of innocent purchasers and to find out whether they justify the rule and its limitations at the present day.

It is frequently laid down as a self-evident maxim that as between two persons having equal equities, one of whom must lose, the legal title shall prevail.[80] But are the "equities" or claims to the property of the purchaser and the prior equitable owner to be regarded as equal? The *cestui* is the "true owner." He has priority. The trustee should not be able to confer upon an innocent purchaser a greater equity or title than he himself had, unless the true owner has by his own conduct made himself justly responsible for the belief that the trustee was owner and had power to convey. Why is it not unconscientious to retain the legal title as against the equity? How does the *bona fide* purchaser get his equitable or beneficial interest from a trustee with a dry legal title? The purchaser would acquire no equity at all unless he could charge the conscience of the true owner against the assertion of his prior right.

Ewart, in his work on estoppel, contends that the modern law of purchaser for value without notice should be based on estoppel by ostensible ownership.[81] According to his theory a "purchase for value without notice never arises except in cases in which the purchaser says he has been misled by somebody's mis-

[79] 30 Harv. L. Rev. 477.
[80] *Rice* v. *Rice* (1853), 2 Drew. 73, 2 White & Tudor L. Cas. 961.
[81] Chapter XI. 49, 152, 264.

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representation. His case always is, 'I bought from a man who pretended to be the owner;' 'the person with whom I dealt appeared to be entitled to bargain with me.'" A purchaser for value without notice is one who changes his position prejudicially upon the faith of the misrepresentation of apparent ownership. He must show that his opponent was in some way to blame for his having been misled.[82]

The Courts frequently say that the reason for the *bona fide* purchaser rule lies in a kind of estoppel, namely, the conduct of the *cestui* in placing or leaving his property in the hands of a trustee which has made possible the abuse of power and wrong-doing by the trustee.

"The principle upon which the *bona fide* purchaser is protected, is that when one or two innocent purchasers must suffer through the fraudulent act of a third person, he who has voluntarily placed such third person in a position to commit this fraud must be the sufferer."[83]

"The possession of legal title by the trustee like the possession of the *indicia* of title by a factor, and of adequate power of attorney under appointment as an agent, clothes him with power to confer upon a *bona fide* purchaser better rights than he himself had."[84]

One dealing with a trustee with notice of the trust must ascertain the scope of his authority, but his acts within his apparent authority will bind the trust estate or the beneficiary, as to third persons acting in good faith and without notice, although the trustee intends to defraud the estate by abuse of power.[85] The principle of estoppel is then an important element in the modern policy of the *bona fide* purchase for value

[82] Compare, however, Huston, Enforcement of Decrees in Equity 127.

[83] *Cochran* v. *Stewart* (1875), 21 Minn. 435; *Behrmann* v. *Seybel* (1917), 178 App. Div. 862, 166 N. Y. S. 254; *Pilcher* v. *Rollins* (1872), L. R. 7 Ch. App. 259, 274, 21 E. R. C. 728, 742; 1 Perry, Trusts, 6th ed., sec. 218.

[84] Huston, Enforcement of Decrees in Equity 131; *In re Hart*, [1912] 3 K. B. 6, 18.

[85] *Kirsch* v. *Tozier* (1894), 143 N. Y. 390, 38 N. E. 375; 2 Perry, Trusts, 6th ed., sec. 814; *Spencer* v. *Webber* (1900), 163 N. Y. 493, 57 N. E. 753; *Dillage* v. *Commercial Bank* (1873), 51 N. Y. 345.

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rule. It says to the beneficiaries, as Ewart points out, when you have accredited the title of the trustee, you become accessory to the representation of his ownership and power of disposal, and you are, therefore, precluded from asserting a claim against an innocent purchaser by virtue of some secret claim or trust. This estoppel should be even stronger as against a voluntary trust than against a constructive trust.

If a man selects a rascal as his trustee, or accepts the benefit of a trust administered by such a representative, he should bear the burden of his rascalities.[86] There is the same responsibility on the part of the true owner for the appearance of ownership in the trustee, whether the *cestui* created the trust himself or is the beneficiary of a trust created by another through whose acts he derives his interest.

It is suggested by Professor Jenks,[87] that a *cestui* might well be absolutely bound as against strangers by his trustee's misconduct, as the *cestui* should be responsible for the frauds of his representative.[88]

If A., the owner of land, contracts with B. to sell it to him at a future date, from the moment of the making of the contract, B. has an equitable interest in the land. This arises from his right of specific performance. If thereafter, A., in violation of his duty to B., makes a conveyance of the legal title to C., who purchases it for a valuable consideration and without notice of B.'s interest, it is well settled that there is no ground for equity to enforce B.'s right against C. But if C. got only a contract right against A., B.'s prior claim would prevail.

This result cannot be entirely explained on principles of estoppel, but is explained by Ewart on the ground that where the merits are equal, the actual estate will prevail over the contractual;[89] in other words, the grantee by the executed conveyance has the

[86] *Hunter* v. *Walters* (1871), L. R. 7 Ch. App. Cas. 75, L. R. 11 Eq. 292.

[87] 24 Law Quar. Rev. 147, 154.

[88] See Sweet, Trusteeship & Agency, 8 Law Quar. Rev. 220.

[89] Ewart, Estoppel 271.

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legal title, and B., by virtue of his prior contract, has what is primarily a right *in personam*, and his contractual estate is a right *in rem* only in so far as he is entitled to the remedy of specific performance. There must always be, as Ewart says, a difference between a conveyance of land and a contract to convey it, and there is no reason to deprive the innocent grantee of what he has obtained in good faith. In case of a contract, the legal title which includes the *jus disponendi* is still left in the vendor, and the purchaser holding under the contract must put his contract on record to deprive the vendor of his power of disposal.

It may be suggested that the rights of a *bona fide* purchaser for value of the legal title would be recognized as against latent equities even though no estoppel could be found. For example, if a conveyance were made to the grantor under a mistake or by fraud, and this was not recorded or seen by the purchaser, and no possession were delivered, yet it may be argued that he would prevail over the equitable claim to avoid the conveyance to his grantor.[90] On principle, however, there would seem to be no valid reason why the purchaser should take a better title than his grantor, or why the prior equity of the true owner should be cut off by a transfer of the legal title where there is no reliance on apparent conveyance or ostensible ownership in the grantor.[91]

V. Position of Purchaser of Equitable Title.

It is an intersting question whether, in theory, the purchaser of an equitable title may gain protection as a purchaser in good faith against prior equities. If T., trustee for C. of an equity of redemption or other equitable estate, sells it to P., a *bona fide* purchaser without notice, should P. be preferred to C., or do their equities rank in the order of time in which their interests were created?

[90] See Williston, 14 Ill. L. Rev. 94.

[91] See *Globe Milling Co.* v. *Minn. Elevator Co.* (1890), 44 Minn. 153, 46 N. W. 306.

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Dean Ames in his classic article on Purchase for Value Without Notice,[92] maintained the following proposition:—

"Just as the honest purchaser of a legal title from one who holds it subject to an equity acquires the legal title discharged of the equity, so also the purchaser of an equitable title from one who holds it subject to an equity takes the equitable title discharged of the equity."[93]

This raises the issue whether a distinction should be drawn between the rights of a purchaser for value of an equitable interest as against a sub-trust on the one hand and as against a prior equitable assignment on the other. It depends on the reason and basis of divestiture of rights by purchase for value without notice.

If a *cestui que trust* of land, after diminishing his equitable interest by an assignment, makes an ostensible conveyance of his rights to an innocent purchaser for value, there is no question that the latter will take subject to the previous assignment apart from recording acts.[94] But it is contended by Dean Ames that if the *cestui* should convey his interest after charging himself with a *sub-trust,* the innocent purchaser ought to take the beneficial interest of the *cestui* discharged of the sub-trust. The same thing, he argues, should be true of a sub-trust created by the operation of the law. If the equitable owner is induced by fraud to assign his interest, the fraudulent purchaser would become a constructive trustee. But if the fraudulent assignee in turn assigns to an innocent purchaser without notice of the constructive trust or claim of the defrauded *cestui,* the equitable title should pass free of this latent equity.

This distinction goes on the ground that the trustee of an equitable interest, unlike the assignor, remains the owner of the *res* or equitable interest, and

[92] Ames, Lectures Legal History 253, 261.
[93] Bogert, Trusts 510, n. 22.
[94] *Phillips* v. *Phillips* (1861), 4 Deg. F. & J. 208.

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has the power to transfer it, while in case of an assignment, he has nothing left to transfer.

None of the decisions, however, as Dean Ames admits, recognized this distinction at the time that he wrote, and none of the later ones seem to have adopted his doctrine. In *Cave* v. *MacKenzie*,[95] M. was constructive trustee of a land contract which he made in his own name as agent for C. He assigned the contract to his son, X., who claims as *bona fide* purchaser. It was held that in equity, he who is prior in time is better in title. The son, as a *bona fide* purchaser, got merely an equitable title which is subordinate to that of the *cestui*.

There are a few of the older English cases to the effect that the defence of purchaser for value without notice does apply even in case of persons not getting the legal title.[96] These cases, however, do not seem to have been followed, and it is now held that the title of a *cestui* is not displaced by anything short of the acquisition of the legal title by the purchaser, or a very strong case of estoppel.[97]

In *Hill* v. *Peters*,[98] where trustees for D. of an equitable interest in personalty, in breach of trust, purported to assign the equitable interest by way of mortgage to T. and handed over the instrument creating the equitable interest, it was held that they had not displaced the prior equity of the beneficiary. So in *Duncan Townsite Co.* v. *Lane*,[99] it is said that the doctrine of *bona fide* purchase applies only to purchasers of the legal estate.[100] As between persons hav-

[95] (1877), 46 L. J. (N.S.) Ch. 564; Ames, Cases on Trusts 308.

[96] *Attorney-General* v. *Wilkins* (1853), 17 Beav. 285; *Finch* v. *Shaw* (1854), 19 Beav. 500; *Lane* v. *Jackson* (1855), 20 Beav. 535; *Penny* v. *Watts* (1848), 2 DeG. & Sm. 501, 521.

[97] *Burgis* v. *Constantine*, [1908] 2 K. B. 501; *Phillips* v. *Phillips* (1861), 4 Deg. F. & J. 208; *Hill* v. *Peters*, [1918] 2 Ch. 273; Pomeroy, Equity Jur., 4th ed., sec. 683 (a); Huston, Enforcement of Decrees 118; 2 White & Tudor L. Cas. 168, 181.

[98] [1918] 2 Ch. 273.

[99] (1917), 245 U. S. 308, 62 L. Ed. 309, 38 S. C. R. 99.

[100] See also *Hawley* v. *Diller* (1900), 178 U. S. 476, 484, 44 L. Ed. 1157, 20 S. C. R. 986; *Boone* v. *Chiles* (1836), 10 Pet. (U.S.) 177, 9 L. Ed. 388; *Lowther Oil Co.* v. *Miller-Sibley Oil Co.* (1903), 53 W. Va. 501, 44 S. E. 433, 97 A. S. R. 1027.

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ing only equitable interests, if their titles are in all other respects equal, priority in time gives the better equity.[101]

The problem is well presented by the facts of *Cave* v. *Cave*.[102] In this case, T. was trustee for A., and used the trust funds dishonestly in purchasing land which he caused to be conveyed to his brother. The brother made a legal mortgage to B. and an equitable mortgage to C., neither B. nor C. having notice of the trust. It was held that B.'s legal mortgage had priority over the equitable interest of A., the beneficiary of the trust, but that A. had priority in turn over C., the equitable mortgagee. As between A. and C., the order of time settles the order of their rights; both have equal claims and as between equitable rights, the oldest prevails if equal in merit.

This decision has been criticized on the ground that the beneficiary should have been held to be estopped as against all the mortgagees from setting up his equitable title. He had permitted his trustee to pose as the owner of the land; upon the faith of his ostensible ownership, innocent persons had been led to change their position. They should accordingly have the better claim. But the English Courts have held that the beneficiaries and mortgagees have equal merits or equities, although on grounds of estoppel the equities would seem most unequal.[103]

As Ewart says in his work on estoppel:—[104]

"Suppose the owner of property, real or personal, transfers it absolutely — title, evidence of title and possession—to a trustee in such a way that there is no trace of a trust visible; and that the trustee afterwards fraudulently disposes of some estate in the property to an innocent purchaser for value. This,

[101] *Taylor* v. *Weston* (1888), 77 Cal. 534, 20 Pac. 62; *Jennings* v. *Bank of California* (1889), 79 Cal. 323, 21 Pac. 852; *United States* v. *Lamm* (1906), 149 Fed. 581; *Johnson* v. *Hayward* (1905), 74 Neb. 157, 103 N. W. 1058.

[102] (1880), 15 Ch. Div. 639.

[103] Ewart, Estoppel 265, 293, 294. Compare Maitland, Equity 131; 2 Pomeroy, Equity Jur. sec. 727.

[104] Ewart, Estoppel 264.

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according to the law of estoppel, is a clear case; the owner is, of course, estopped—he has accredited the title of the trustee and cannot deny it.''[105]

According to the rule of purchase for value, however, the case depends upon the nature of the estate which the purchaser acquires, legal or equitable. The mere fact that a person has transferred legal ownership of property real or personal to a trustee and has given him the *indicia* of title, does not estop him as against a *bona fide* purchaser unless the purchaser gets the legal title. The purchaser who doesn't get the legal title cannot set up the apparent ownership of the trustee as a ground of estoppel against the beneficial owner.[106] This is supported by the following peculiar reason:—

''Because it is in accordance with the usages of mankind that the legal estate in property should be conveyed to, and *indicia* of title deposited with trustees, and no member of the community, therefore, is entitled to allege that such a course of action constitutes any invitation to him from which a duty towards him can be inferred.''

Although there is nothing whatever on the face of the documents of title to indicate the possibility of a trust, the beneficial owner according to this doctrine can still prevail over an equitable purchaser or mortgagee. A person dealing with a legal owner must take the chances of his being a trustee and he can protect himself only by getting a legal transfer. This theory of common usage by which the equity of the beneficiary prevails would, of course, not hold in America under our system of the registration of the instruments of title.

Dean Ames would criticize the result reached in *Cave* v. *Cave*,[107] and similar cases on the ground that as the conscience of C., the purchaser of the equitable interest, was not affected by the personal obligation

[105] Citing *Dillage* v. *Commercial Bank* (1873), 51 N. Y. 345.
[106] *Burgis* v. *Constantine*, [1908] 2 K. B. 484, 501.
[107] (1880), 15 Ch. Div. 639.

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of the trustee, as against A., the *cestui*, there was no unjust enrichment and no ground to deprive him of the equitable title, and that equity will not take away from a purchaser what he has obtained for value and in good faith. The English cases, however, hold that C. doesn't get any equitable title, that where a trustee holds an equitable interest which he has no right to assign, his assignee gets nothing, that conveyances of equitable estates are "innocent" conveyances and defeat no prior rights.

According to Dean Ames' theory, there is a perfect analogy between a trust of an equitable estate and a trust of the legal estate. The *cestui* stands in the same relation to the holder in trust of an equitable *res* or interest as to the holder in trust of a legal title. In neither case, according to Dean Ames, has he a direct right or claim upon the property, but in each case he must work out his rights through the enforcement of a personal obligation.[108]

The assumption which lies at the foundation of Dean Ames' theory that the trustee of an equitable estate remains "*complete owner of the equitable obligation*" or interest, "*subject to a duty in favour of the cestui que trust of the obligation*" or equitable interest, is a premise which is not accepted by the Courts. If this premise were once admitted it might follow logically, as Dean Ames contends, that as the legal title may be transferred to an innocent purchaser discharged of the personal obligation or duty of the trustee, so on principle the equitable title should be.

The law of transfer is in general the same for both legal and equitable estate. Whatever would be the rule of law in the case of a legal estate is in general applied by a Court of Chancery by analogy to an equitable state.[109] It seems an arbitrary anomaly that the rights of a *bona fide* purchaser for value from the trustee of an equity of redemption should be made to turn on whether the mortgagor be regarded as the

[108] Ames, Lectures Legal History 263.

[109] *Freedman's Savings & Trust Co.* v. *Earle* (1884), 110 U. S. 710, 28 L. Ed. 301, 4 S. C. R. 226; 1 Spence, Equity Jur. sec. 502.

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legal or equitable owner, and whether the "title" or "lien" theory of mortgages be adopted at law in the particular jurisdiction. In all jurisdictions, a mortgage is merely a lien in equity and the mortgagor is the true and substantial owner of the property.[110]

When the trustee's estate is equitable merely, there is no necessity for regarding the trustee as the "owner" of the estate at all. What the trustee holds is really a *power*, and the *cestui* is the owner of the property, subject to the exercise of the power. A declaration of a sub-trust, then, would seem to operate in equity like an assignment, namely, to transfer to the sub-beneficiary the substantial equitable interest. There is thus no real distinction between an assignment and a sub-trust, except so far as the sub-beneficiary may be bound by *estoppel* or by the ostensible authority which he confers on the trustee to deal with third parties. A declaration of trust is equivalent to an assignment of an equitable interest, a reduction *pro tanto*. As between successive assignments, the prior prevails.

According to the English cases, a strong case of estoppel must be shown to give priority to one who deals with the trustee of an equitable interest beyond his authority. Even a conveyance to the trustee, absolute on its face, so that the trustee is able to deal with the property without giving any notice of the trust, is held not to destroy the priority of the beneficiary against a purchaser of an equitable interest from the trustee.[111]

Where, however, the *indicia* of title are transferred to a trustee with the intent that he shall deal with the property, and he exceeds the limits of his authority, the *cestui* must suffer as against an innocent purchaser of the equitable title. Often there is no distinction between agency and trust cases.[112]

[110] See *Arnold* v. *Southern Pine Lumber Co.* (1909), 58 Tex. Civ. App. 186, 198, 123 S. W. 1162, 1168.

[111] *Carrit* v. *Real & Personal Advance Co.* (1888), 42 Ch. Div. 263; *Shropshire, etc., R. Co.* v. *The Queen* (1875), L. R. 7 H. L. 496, 505.

[112] *Rimmer* v. *Webster*, [1902] 2 Ch. 163; *Lloyds Bank* v. *Bullock*, [1896] 2 Ch. 192; *Lloyds Banking Co.* v. *Jones* (1885), 29 Ch. Div. 221.

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If A., the owner of an equitable fee, purports to convey to B. and his heirs on trust that B. shall sell the land and account to him for the proceeds, in legal effect, B. will merely have a power, not the dominion, which will remain in those who are entitled to the beneficial ownership. At law, a trustee of a legal estate is regarded as holding the full legal title. His powers are often more extensive than necessary to execute the trust and may be abused; and the risk of loss from their abuse should be put on the beneficiary of the trust. But in equity, the trustee may be invested with a power exactly commensurate with the purposes of the trust, and active trusts may be treated, as under the New York legislation, after the manner of powers. So under the recording acts where the instrument creating the trust is recorded, equitable interests which were formerly subject to be defeated, are rendered indefeasible and become in effect a legal estate in the land. It has indeed been enacted in some states that whenever the trust is expressed in a recorded instrument a conveyance by the trustee in contravention of the trust is absolutely void.[113]

The function of the trustee is historically related to that of the agent.[114] A trustee is in equity not an owner at all, but a species of agent, upon whom the creator of the trust has conferred the power and imposed the duty of administering the property of another person, so that he may enjoy the benefits. He is a nominal owner bound to use his powers in behalf of the real owner. These powers, in case of the trustee of an equitable estate, may not enable him to transfer to a purchaser a title free and clear of the trust obligation. The mere fact of *bona fide* purchase is thus insufficient in case of equitable estates to give the purchaser priority.[115] It is only where the trustee has the legal title that he can (perhaps) convey free and clear of prior equities in the absence of estoppel.

[113] Minn. G. S. 1913, sec. 6720.

[114] 2 Pollock & Maitland, History of English Law 229, 233; Sweet, Trusteeship & Agency, 8 Law Quar. Rev. 220; Salmond, Jurisprudence, 3rd ed., 233.

[115] Huston, Enforcement of Decrees of Equity 120, 131.

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In a leading English case, *Directors of Shropshire, etc., Ry. Co.* v. *The Queen*,[116] one Holyoake held shares in his own name in trust for the defendants. His name appeared upon the register as owner. He deposited the certificates with one Robson as security for a loan covenanting to give a legal mortgage. Robson, who was ignorant of the trust, was a *bona fide* purchaser. It was held that the *cestuis*, who were the real owners in equity, had not lost their rights. The placing of the title of the shares of stock in the name of a sole trustee and allowing him to have possession of the certificates, which he wrongfully deposited by way of an equitable mortgage, did not give the equitable mortgagee priority as a *bona fide* purchaser over the *cestuis*. There must be conduct, such as representations by the *cestuis*, which would raise an estoppel. But if the purchaser takes a mere equitable transfer, the trustee does not bind the real owner beyond the scope of his actual authority.[117]

As counsel argued in the Shropshire case, the situation is this: a purchaser sees certificates in the trustee's possession. He purchases or advances money on the security of the certificates, believing that the person who is registered as owner and who has possession of the certificates of ownership is in fact full owner. If he deals with the trustee by equitable transfer or assignment without getting a formal endorsement, should not this bind the equitable owner? Does the fact that the lender took only an equitable charge instead of a legal transfer alter the case? Can the *cestui* set up an equal equity, or should he not be the one to suffer the consequences of the misconduct of his representative when he has encouraged the belief that the trustee is absolute owner with full power of dis-

[116] (1875), L. R. 7 H. L. 496.

[117] So it has been held that taking a conveyance in the name of a clerk who had access to the securities and who took and deposited the title deeds with an equitable mortgagee, was not sufficient to postpone the real owner, the beneficiary, to the trustee's equitable mortgagee. *Carrit* v. *Real and Personal Advance Co.* (1888), 42 Chancery Div. 263. But compare *Rimmer* v. *Webster*, [1902] 2 Ch. 163.

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position?[118] If one chooses to have a representative or trustee to administer his property should he not be the one to suffer for any act of improper management or disposition, whether there is a transfer of the legal title or only an equitable assignment or executory contract.[119]

Estoppel should on principle be held to arise as soon as a contract is made and money is advanced in reliance on the ostensible ownership. The situation is then such that the purchaser has the superior equity and better right to call for the legal title. Estoppel in no way requires that the purchaser shall have acquired the legal estate. A change of position is all that is essential. Thus, in agency cases, it is not necessary that the third person should have acquired any legal estate, but merely that the principal should have assisted his agent to misrepresent the scope of his authority. Thus, if an innocent purchaser takes possession and makes improvements on the land without having paid the purchase money in full, or having acquired the legal title, he should be protected as against a prior equity of which he had no notice.[120]

A promise might well be considered as "value." Under the Uniform Sales Act, value is defined as "consideration sufficient to support a simple contract." As Williston says in his work on sales:[121]

"Upon principle there seems no good reason why a purchaser should be deprived of the benefit of his bargain because his obligation to pay is executory. The original owner or claimant of goods should not have the right to deprive the innocent purchaser of goods, but should be obliged to get relief upon the

[118] See also *Hunter* v. *Walters* (1870), L. R. 11 Eq. 292, on appeal (1871), L. R. 7 Ch. App. 75; *Rice* v. *Rice* (1853), 2 Drew. 73; 2 White & Tudor L. Cas. 916; *Wilson* v. *Hicks* (1884), 40 Oh. St. 418; *Lloyds Banking Co.* v. *Jones* (1885), 29 Ch. Div. 221; *Dueber Watch Case Manufacturing Co.* v. *Dougherty* (1900), 62 Oh. St. 589, 57 N. E. 455.

[119] See Ewart, Estoppel, 267, 271, 341; Ames, Cases on Trusts 305 n.

[120] *Temples* v. *Temples* (1883), 70 Ga. 480. See 2 Tiffany, Real Property, 2nd ed., sec. 574, p. 2253.

[121] Williston, Sales, sec. 621.

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enforcement for his advantage, of the obligation of the purchaser to pay the price.'"[122]

The recording Acts in the United States have extended the doctrine of *bona fide* purchase to one who has acquired an equitable estate merely against another who claims a prior legal estate by an unrecorded document. Rights created by unrecorded instruments are thus equivalent merely to equitable interests which may be cut off by innocent purchase even of an equitable title.[123]

[122] See also Ames, Cases on Trusts, 2nd ed., 287.

[123] 2 Pomeroy, Equity Jur., secs. 758, 772; 2 Tiffany, Real Property, 2nd ed., secs. 567, 575, p. 211.

(*Concluded in April Issue.*)

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REDUCTIO AD ABSURDUM.

By A. B. Hogg, Barrister-at-law.

To many of our advanced thinkers nothing is more lamentable than the conservatism of lawyers. Slow to accept and slower to conceive any ideas that mean progress to society, the lawyer finds himself and his kind slowly but steadily slipping from the pinnacles of power on which he and his predecessors have somehow stood so long.

Perhaps the fault lies in a certain aberration of thought. The legal mind, having dwelt so much in the distant past, looks too far up the vista of history for precedents. If we but turn our eyes to modern instances, may we not find precedents enough for many projects generally regarded by the profession as too radical for serious attention. In customs and doctrines now well established may we not get the premises from which to deduce with all the consistency of logic, many propositions for reform hitherto considered extreme. The effort may help regain for us some prestige of leadership. To suggest a few reforms that even the reformers have not announced may remove a glaring stigma that in their eyes obscures our real attainments.

By Act of Parliament or Order-in-Council are we recasting society. By whatever principle it be, the supremacy of Parliament, the rule of law, or what you will, the practice obtains of so shaping and turning the social order as to meet the needs and the ideals of the day. The handiest tool in the great job of reconstruction is the law. In every quarter a most pressing need is to organize: whatever be the work in hand the great ideal is to organize. In unity is strength and from co-operation comes success. Individual effort, self-guided conduct lead only to inequality and discontent. Even in the struggle to organize appears the evil of competition, the competition for leadership. What we suggest to promote harmony and to quell

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unrest is a complete reorganization of society by the State. The fairness and the moderation of this scheme should appeal to every person and to every class. Let the State create within itself by Act of Parliament as many organizations as there are adult persons in the State. Let the membership in each include all persons who for their own interests should be members. Then to each adult let Parliament assign the leadership of one organization. To function properly each body should have its headquarters and its meeting place at the residence of its leader. Meetings should be frequent and, by law, attendance for all those within reasonable distance should be compulsory. To each body thus operating for the general good of its members we might afford full protection with no liability at law. Thus by one Act of Parliament might we accomplish what is now taking so much time and energy among a large part of the population.

With this reorganization of society it would be an easy move to eliminate private contracts and substitute collective bargaining. Whether for commodities or for labour, the individual wishing to buy would negotiate with an organization. The State would not need to regulate, nor could the individual manipulate the price of things. Those only who know, those who feel the exigencies of the times would collectively control their own markets. Nevertheless a debtor would ever be a ward of the courts, and the creditor would always enter the precincts of a court with unclean hands. In newly settled parts, where the outcome of economic ventures is so uncertain, time should ever more be the essence of any contract. At all times the Legislature would stand ready, at the instance of any economic group, to interpose its high authority against the stern judgments of a court. These are but a few of the seemingly inconsistent reforms one might suggest for the new order of society. All these measures, however, might find a place in a general codification of recent laws and usages from various parts of this Dominion.

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An ideal near attainment to-day is the complete emancipation of women. Suffering for ages the subjection incident to protection, the so-called weaker sex have at last realized the mockery of their position. The equality of the sexes is now so obvious we take it as an axiom. Though renouncing the right to all protection due the weak, our women-kind have not yet asserted the fullness of their strength. In the political upheavals of the day is their sufficient precedent. Numerous and diversified as are the occupations of men, there is an overwhelming majority of women in a single occupation, that of keeping house. In numbers the housekeepers of the land exceed any other group or class. And we govern by majorities. As a group then, economically and socially a group, let the housekeepers advance into power. As a majority, let them rule. Can we not picture this army of the oppressed, their banner a dish towel, their emblem a broom, marching grandly on to victory shouting the battlecry of freedom. What a house-cleaning would follow in the halls of state. For the first time in history could women alone sit in the Government benches, women fill the civil service, women lead our armies and women rule the men.

Lastly, if we may borrow in part our precedents from a neighbouring country, should we not advocate a new law of divorce? Divorce means disunion. Though applied in law only to marriage, let us adapt the idea to other unions just as vital. For cruelty or desertion, the cruelty of the unspoken word, the desertion of undisguised contempt, wife or husband may go across the border and get relief. For infidelity to a solemn vow, for violation of a sacred precept, the same unhappy spouse may have his remedy in our courts at home. Whatever be the full relationship of husband and wife, and we grant it is something more than legal obligation, a legal dissolution undoes it all. Why confine this remedy to husband and wife? They of their own free will and with the widest choice have formed for themselves the bonds they wish untied.

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Still many a worthy citizen will seek in vain release from the agonizing bonds of lineage and blood in the making of which he obviously had no choice or knowledge. Consider the lot of some ambitious youth to whom life is one grim struggle for success. His father is a ne'er-do-well whose name no son can bear with pride. Should not our courts grant to that unhappy son a dissolution of the filial tie. Here is a man newly rich and influential who at the height of his career discovers unexpectedly a host of poor relations. From these he endures perpetual humiliation and annoyance. From him the humble relatives can expect no more than courtesy forced and condescending. Why not for the sake of happiness and in the name of justice grant to these beings so incongruously related by a mere accident of nature complete surcease from all their fruitless woe. A change of name, a release from legal duty one toward another, and all the indignities of blood, all the handicaps of family may disappear from the record of a successful life.

Other projects suggest themselves for every sphere of public reform. For instance, as the whole is greater than its part, and the funds of Governments know not the limitations of our own—the Government in fact being the maker of money—we might suggest in the interest of those united farmers who live in the dry areas east of the Rocky Mountains, shut off from western rains by that rugged barrier, that our Government with its nation-wide resources proceed to remove the tops of those mountains. The expenditure of much money, however, is usually a contentious matter even among persons not in power. We confine our propaganda to such reforms as may go forward without any lavish outlay of money and without any logical departure from current doctrine.

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THE FETICH OF PRECEDENT.

By H. C. B. Forsyth.

During the last century stupendous strides have marked the advancement of nearly all the sciences. Discovery and invention on every hand have revolutionized the life of the people the world over, but even in the most civilized communities, the Science of Jurisprudence has proved herself to be only a feeble follower in the march of progress, and Justice is still but a blinded stumbler bearing her scales far in the rear of the procession.

Why so vital a branch of learning, which probably contains to-day, and has contained in the past, as many of the brightest intellects of the times as any other, lags so conspicuously behind the general average, is, I think, well worth considering for the purpose of ascertaining the cause and if possible the remedy.

Among many reasons more or less remote which might be invoked to explain the assumption I have been bold enough to make, is what I have elected to call the Fetich of Precedent. It has ever been the misfortune of Jurists to look neither before nor within when looking back would serve their immediate needs. Hence, I do believe, the present unfortunate out-of-date position of Jurisprudence among the other sciences and the scant respect which it receives and has always received from master minds in other branches of learning.

It is true that of all scientists the Jurist has the most intractable material to deal with. The human element is mostly dominant, and it is unquestionably uncertain beyond measure—but making every allowance for that, the science of Jurisprudence is not in the class even with Meteorology, and one may to-day obtain a much more reliable forecast regarding the weather than one can regarding the result of a trial or even of an appeal.

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I would not for a moment discredit precedent entirely nor suggest that it is not valuable in its way, but I do insist that it dominates the Judicial atmosphere to-day as it has done more or less in the past, to the destruction of all real progress. Particularly is this so as regards precedents of pleading. Surely the day has arrived when a litigant should not under any circumstances be deprived of his just rights because of failure to comply with some antiquated rule of pleading. Yet instances of this still happen in the Courts all too frequently. Then again precedent in legal education presents an almost inseparable barrier to progress. The law students' battle cry of to-day is "Precedent," and it is seldom or never that you hear referred to in our Courts some broad and inclusive principle of Law and Justice inherent almost in the very conscientiousness of man; for the value of such seems to have been lost in the voluminous reports of to-day.

The modern law student is not taught that Justice is a concrete entity, a something as real, actual and existent as the law of gravitation—albeit a reality only most imperfectly realized by humanity—but is rather induced to believe that it is something purely empirical. Best to be discovered and demonstrated by an impartial study of the facts and the statute law and a fearless reaching into the conscience, it is too often sought by a blind groping in the dusty annals of the past.

But it certainly is in case law the menace of precedent appears in its most ominous and dangerous form. It is such an easy way out for everybody concerned and covers a multitude of sins. Counsel for the defendant confronts His Lordship with *Brown* v. *Smith,* decided in 1841, and still binding on this Honourable Court. The case at bar is really involved and difficult and *Brown* v. *Smith* is very tempting. His Lordship seizes on it with avidity, finding an easy and safe way out and congratulating counsel in the bottom of his heart on the fortunate result of his archæologi-

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cal researches, and plaintiff's counsel tells his client with a sigh: "Well you know we could not get away from *Brown* v. *Smith.*"

Talk about straining at a gnat and swallowing a camel, some of the most marvellous and spectacular feats of mental acrobacy are to be found in the manner in which cases are applied, approved and distinguished. Seldom indeed do we find a Judge or a Court to-day bold enough to defy precedent, yet precedent was all at one time created and should we not now make a start to evolve? Every Western lawyer knows, for instance, that grave injustice has been done in Western cases where the Torrens System of Land Titles prevails, by an inclination to follow too closely the precedents created in less fortunate countries. However, let me not be misunderstood. Case law contains much valuable matter which would ill be lost to the profession, but surely the Judges of to-day are not of any lower mental calibre, less well-educated, cultured, conscientious or impartial than those of yesterday? Why then consider themselves hide-bound by precedent? The throne of yesterday should be the footstool of to-morrow.

While antiquated precedent, permeating and ramifying the whole, clogs the mills of modern justice and the Fetich is idolatrously worshipped in every Court of law to-day to the incalculable loss and detriment of civilization, precious traditions of the Legal profession are being almost lost sight of. These I would carefully distinguish from Precedent.

The science of Jurisprudence can, at least, boast of traditions of nobility, dignity and integrity, not, perhaps, spectacular, but which few other sciences can equal and none surpass.

That no true progress can be made under existing conditions seems evident. If Jurisprudence is to secure the confidence which to-day it signally fails to inspire, this constant and persistent attempt to progress by retrogression must cease, and the Jurist should seek, rather, in every branch of modern science

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that inspiration to advancement which he so conspicuously lacks to-day. Legal Education should be broadened so as to include more of ethics and science and less ready-made law; while fearless legislation embodying the most radical changes for the simplification of procedure and the speeding up of trials in Courts of Law, should mark the dawn of a New Era of enlightened Justice.

EDITORIAL NOTE.

The publication of this Article is not to be taken as an endorsement of its views by the CANADIAN LAW TIMES.

The author is evidently awakening to a realization that there is something wrong with the study and practice as well as with the dispensation of Law in this Country. We agree with him there. But he mixes up causes and effects and attributes to the "science of jurisprudence" itself, the defects which are solely attributable to imperfect and grotesque conceptions of it by those who profess to follow it in their practice of the Law. As well might one denounce Medical Science because the Charlatan, disdaining its teachings, dispenses indiscriminately to all and sundry from his waistcoat pocket his "cure for all infirmities that flesh is heir to." The fact that the public patronize the quack and suffer for it eventually, is no reflection upon the expert Medical Man whose scientific skill has been scorned.

The author says the "Fetich of Precedent is the Law Students' battle cry to-day." That is not a fault of the Precedent, nor does it warrant the author's attack upon the system of building up our Law and fortifying it by precedents. It is a superb system; but it is abused; and through the abuse, and not the system, our Lawyers under existing conditions are turned out in hundreds nothing better, and nothing other, than empirics. And worst of all is the fact, that it is the empiric that seems best to satisfy the litigating clientele if we are to judge of their patronage.

The real lawyer never seeks a Precedent till he has worked out in his own mind the legal principles of his case, and reached a conclusion. It is then a Precedent, serves him either to fortify his opinion or to reveal an error in his mental process of reaching it. That is the only proper use of a Precedent.

Correct the abuse of the system and you abolish the empiric.

We have advocated radical reform over and over again in the system of both teaching and of practising Law.

Professors and Lecturers in our Colleges and Law Schools talk of cases as if cases were Law. They are no more than the embodiment of an anterior legal principle and the present application of it to certain conditions or facts. That same principle may find just application to an infinite variety of conditions or facts. They

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change, but the principle does not; and it is the inability to distinguish arrays of facts from other arrays of facts in their relation to a legal principle that bewilders and confounds the Student, and, too often, the new-fledged Lawyer who, more than likely, have been fed up and developed upon the empirical sands of precedents instead of the philosophical basis of principles.

Too many of our Judiciary have evolved under this distressfully distorted system, but happily though some remain its slaves most of them have burst its bonds, and risen triumphant exponents of real Justice.

If we are to produce true lawyers we must reverse our tutorial system: we must teach principles and not precedents as the authentic sources of Law. The first process produces scientists while the second produces empirics; and it is the scientific Lawyer that Canada needs, and not the expert skidder on the surface, in this period of her evolvement into the Stature and Status of Nationhood.

I would add, let the Law Societies all over Canada look around and see whether the men who are invested with the functions of teaching Law by delivering Lectures to our Students are men who have learned and are able to inculcate or impart Laws scientifically; or whether they are mere empirics themselves.

B. T.

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CORRESPONDENCE

DIVORCE LAW—PARLIAMENTARY AND DOMINION-WIDE.

Port Arthur, Ont.,
March 7th, 1922.

Editor, Canadian Law Times:

DEAR SIR.—I have read with much interest your many excellent articles regarding the question of Divorce in Canada, but, as a Lawyer, and a fairly careful student of the British North America Act, I can only partly agree with them.

With what is said regarding the Western Provinces, I can thoroughly agree. When they were created, the Dominion Parliament enacted that the laws of England, as they existed on July 15th, 1870, should be the basis of the laws of those provinces. In doing so, the Dominion Parliament was held to have legislated on the question of Marriage and Divorce, over which it was given exclusive jurisdiction by Section 91 of the British North America Act, subject to section 92, which gives to the Provincial Legislatures the exclusive right to legislate regarding solemnization of Marriage, within the Province. That is the basis of the Divorce Law in the West—that the Dominion Parliament brought the Matrimonial Causes Act of 1857 into force in those Provinces.

But Ontario and Quebec are in a very different situation. The foundation of civil law in Quebec is French Civil Law, which did not countenance Divorce; and the basis of civil law in Ontario is English Law as it existed in 1792—not 1870. Hence the English Matrimonial Causes Act does not apply to either of these Provinces. The Statutory changes are the laws enacted by the late Province of Canada, and the Deceased Wife's Sister's Marriage Act of the Domin-

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ion of Canada, plus the much-discussed private Acts of Divorce.

My contention is that those Private Acts are legal, not because the Committee of the Senate has (or has not) assumed judicial functions, but because each of those Acts is an exercise of the powers conferred on the Dominion Parliament by section 91 of the British North America Act; and if the Dominion Parliament has no power to enact them, it follows that it has no power to pass a general Divorce Law. Certainly the Provincial Legislatures cannot enact such Acts, because it would be a direct violation of section 91. If a conflict occurs between "property and civil rights" referred to in Section 92, and "marriage and divorce" in Section 91, then the Dominion Jurisdiction must prevail; because, where all things are equal, the Dominion prevails over the province. This is just the reverse of the situation in the United States, where, if all things are equal, the State jurisdiction prevails over the Federal jurisdiction.

The framers of our Constitution wished to avoid the state of affairs existing in the United States and they reversed the rule which prevailed there.

I quite agree that Parliamentary Divorce ought to be done away with, and if divorce is to be allowed at all, the Provincial Courts should be empowered by a general Divorce Act to administer uniform Divorce Law for all Canada. Whether or not divorce should be allowed at all, is a nice question. If it is, adultery and similar offences should be made crimes, and the divorce courts when established should be empowered to punish, and punish severely, such crimes.

The present situation in Canada is reprehensible enough in that it allows a rich man to obtain a private Act of Divorce, which a poor man cannot afford; but it is decidedly preferable to the situation which exists in many of the States of the American Union, where it is often easier to break the bonds of marriage than many ordinary civil contracts.

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If such divorce courts are empowered to punish either party for adultery and similar offences, a petitioner will take very good care not to approach the court unless he comes with clean hands; and respondents would be taught to respect the laws of the country, if they have none for the laws of God.

I think that the attitude of Quebec has been at the bottom of the delay by the Dominion in enacting Divorce legislation for all Canada. I believe that the Dominion enacted it for the West unintentionally, and unwittingly; and the best that can be hoped for is that the Dominion will empower the Ontario Courts to administer divorce law in Ontario, which it has power to do under Section 91 of the British North America Act.

Yours truly,
MALCOLM A. MCKAY.

EDITORIAL COMMENT.

We publish this letter principally because it is a reflection of the Ontario attitude of mind.

The English Divorce Law has been in operation in the Western Provinces since 1919, so that that is an accomplished fact and beyond discussion, though we may say when the present writer first advanced the argument in 1917 that these Provinces had had the Divorce Law for nearly 40 years he was assailed with something akin to venom. It is on record in both the C. L. T. and C. L. J.

With regard to Ontario; we have stated over and over again and particularly in the Article in the February issue, that it had the Common Law from, if not 1791, at all events from 1840; that the Divorce Law was not Canon Law but part of the Common Law; and that Ontario had all the years up till 1867 to adapt this Law to its own requirements. It failed to do so. Hence its dilemma; and hence its necessity for resorting to Parliament for Private Divorces.

Why did it not get its Marriage Contracts dissolved by the Ontario Legislature? That is the only competent authority to do so in the absence of a Divorce Law which the Parliament of Canada is empowered to enact but has always shelved—for reasons better left unstated, though Quebec has a system of its own for Divorce *a mensa et thoro.*

We need not repeat the arguments we have so often advanced that the authority of the Parliament of Canada in reference to Divorce is confined to making a general Law "for the peace, order and good government of Canada;" and dissolving marriage contracts one by one is not making a Law; and more particularly as

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there is no Law available to the Dominion or the Parliament of Canada upon which it can act or proceed to thus break the Civil Contract of marriage. Every time it acts or proceeds in this way, it is playing the autocrat. The Dominion has no Law against adultery or any of the other offences for which Parliament grants absolute Divorces. Its Acts are not Law but autocratic decrees of a makeshift Star Chamber; and they are encroachments on the Provincial authority over "Civil Rights." The Private Divorce Acts of the Parliament of Canada are illegal and void; and children born to divorced people through subsequent marriages are simply "born out of wedlock." What an appalling crime Ontario has one day to face!

The mere assertion of our correspondent that these Private Divorce Acts are an exercise by Parliament of the legislative power of section 91, B. N. A. Act, does not, without a stated reason, amount to anything. I have stated my contrary reason *ad libitum;* but I never got any contrary reason beyond the bare assertion that I was wrong. A Lawyer never wins by a dogma but by an argument. The assertion is merely the reflection of a belief in conditions in which a man is born, or finds himself, without any investigation as to their reality or legality. I have examined them candidly in quest of the truth and of Law and reality; and neither truth, Law nor reality do I find in the Private Divorce Acts of Parliament. They are a sham and a pretext on the part of Parliament and those who patronize them; and they are a fraud on the public.

We must, while thus far disagreeing with our esteemed correspondent, thank him sincerely for the concluding part of his letter dealing with the need for a Dominion-wide Divorce Law.

This subject has been advocated almost continuously for over two years by the C. L. T.; and it was to urge its quick accomplishment that Parliamentary Divorce was attacked and proved to be what it is—an evasion; and a spurious imitation of a system discarded by England over 60 years ago.

Since Ontario is content with this and since the West has a Divorce Law, though very much out of date, I feel inclined to abandon this field of discussion and agitation.

B. T.

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ADDRESS TO THE MANITOBA BAR ASSOCIATION.

By Edward Anderson, K.C., President.*

Gentlemen: It is with much pleasure that I again welcome you to another meeting of our Association. I congratulate the members on the very great success of the last annual meeting and hope and believe that this meeting will prove a still greater success. It is the aim of your Executive to make this a live and progressive organization the working of which will prove of mutual benefit to the profession and to the public.

In the past year we have held several luncheons at which interesting addresses were given. We also had a dinner at which an instructive address was delivered by Professor Osborne.

Among the objects to be obtained by an organization such as ours are the promotion of goodwill and good fellowship among the members, the mutual advancement of our members and the inculcation of a lofty conception of the duties and privileges of the members of the legal profession, and above all the relationship of the lawyer to the community and his influence upon and duty to the public.

The question of the education of those who should be admitted to the practice of the law is also a matter which has received attention from our Association. At the last annual meeting a considerable portion of our time was taken up with the discussion of this question, and some very interesting and educational addresses were delivered and much good was accomplished.

Among the addresses to be delivered at this meeting is one by Dean Thorson, explaining the workings

* Editor's Note.—This admirable address is so replete with viewpoints on Education, Ethics, Uniformity of Laws, converging affinities between Canada and the U. S. A. and other matters, that we feel constrained to give our readers all over the Dominion the privilege of reading and benefiting by it.—B.T.

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of the Manitoba Law School and the question of legal education generally. It is becoming more and more evident that a person intending to engage in the profession of law should start out with a high degree of mental equipment to properly qualify himself to become a member of the most strenuous of all the professions. Great credit is due Judge Robson for his untiring and unselfish work in connection with legal education, and that we have a successful and efficient law school is due largely to his able and persistent efforts.

The public is prone to criticise and gibe at members of our profession, and it should be the object and aim of a lawyer to so conduct himself that such criticism is unmerited. By reason of the public nature of the lawyer's calling, and by reason of the blows which he has to deliver in connection with the practise of the litigious side of his profession, it is not unnatural that a certain amount of criticism should be provoked, though the fact remains that a great deal of the criticism levelled at the lawyers is entirely unjustified.

The lawyer's influence in the community is, and properly should be, very great. He is called on to exercise his expert skill and knowledge in assisting to frame the laws of the country. He is very often a member of one of our legislative bodies, and in the daily practice of his profession he is called upon to construe and apply the laws so framed, and I am bound to say that in my opinion in the vast majority of cases the lawyer discharges his duty in the most praiseworthy manner. As a citizen he stands in the front ranks, and is ever ready cheerfully to do his share of public service and help to bring about a better condition of affairs for the community at large, and is also prepared to give largely of his expert knowledge and training for this purpose.

As an example of this I might mention the activities of many of the committees of the Canadian Bar Association. One that deserves special mention is the Committee on Uniformity of Laws, which has already

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accomplished a great deal in the way of having uniform laws on commercial matters enacted in many of the Provincial Legislatures, which uniformity and the simplification of procedure introduced, is an important factor in reducing legal expenses, as well as being of great practical benefit to the business community. Three prominent members of our Bar are on this committee and have given very largely of their time and ability for some years in this connection without monetary remuneration of any shape or kind. I only mention this one incident out of many which I could call up, merely to show the disinterested motive of members of our profession.

There was a time when the charge was laid against lawyers (and I think with a great deal of foundation), that they gloried in technicalities and endeavoured to obscure the real issues of litigation in a forensic battle over form and procedure, and the lawyer who could draw the most skilful pleading stood to win his case irrespective of its real merits. This spirit, however, has almost entirely disappeared and the lawyers of to-day are doing their share towards the simplification of legal procedure and sweeping away technicalities and getting at the merits of litigation without needless expense.

In no association, that I am aware of, are the duties and responsibilities of the members so persistently and insistently pressed upon them and the necessity of conducting themselves according to the strictest ethics and morals. They are exhorted to comport themselves with dignity, to be fair and honest in all their dealings, and to obey the Golden Rule. In this connection I observe with pleasure that the principal address to be delivered at our meeting is on the subject of the Duty of the Bar Association to the Public, by Mr. Parks, the President of the Hennepin County Bar Association (Minneapolis).

Lawyers are sometimes accused of making excessive charges for their professional services. Such cases, however, are rare, and cases of unreasonable charges

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are the exception rather than the rule. I have now had many years of experience in our profession, and I have latterly had much to do with experts in other callings, and I am in a position to say that the average lawyer of to-day is not receiving nearly so high a reward for his services as experts in other professions and businesses. My explanation of this is that among the best lawyers the question of remuneration is only a secondary one, and that the first object of a good lawyer is the discharge to the best of his ability of his duty to his client and to the public, the question of remuneration being a secondary one. Nevertheless, the labourer is worthy of his hire, and the lawyer is entitled to be remunerated according to the ability and skill which he devotes to the case and the responsibility involved, but no honest or right-minded lawyer will ever seek to take advantage of a situation to unduly profit himself. Lawyers are more and more becoming allied with business enterprise and are being constantly called upon to devote their skill and experience in advising and assisting business men in carrying out large industrial and other undertakings which are multiplying so rapidly. This makes it all the more imperative that our members should have high ethical standards to guide them in the discharge of their duties. The time was when to become a skilled and successful advocate was the ambition of every student and lawyer. To-day the position of the successful business lawyer is equal to that of the advocate and its emoluments greater. In saying this I am far from suggesting that the skilled advocate is not as necessary as ever, in fact, to have our laws properly interpreted and applied we must have them analyzed by the best minds in the profession. All I am pointing out is that another very wide and important field has been opened up to the lawyer in which the exercise of the highest talent is called for.

It is a great pleasure to extend to Mr. Parkes, the President of the Hennepin County Bar Association, and the Hon. Tracey R. Bangs, President of the North

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Dakota Bar Association, and the gentlemen accompanying them, a very warm welcome. The success of our meetings is being largely added to by the fact that our legal brethren from the United States are joining with us in taking part in our deliberations. Last year we had with us a very distinguished American lawyer from St. Paul, Mr. Pierce Butler, who delivered a most eloquent address on the subject of "Common Points of View."

The suggestion has been made that we might hold joint meetings of the Minnesota Bar Association and of our Association. This, however, is perhaps somewhat impracticable, but the presence of a number of American lawyers at our annual gatherings will increase the interest and prove of mutual benefit. We shall be delighted on our part to reciprocate by sending to the Minnesota Bar Association meetings a number of our members.

It is becoming more and more apparent that the future peace and prosperity of the world depends in a very large measure upon the English-speaking people. The Canadian and American viewpoint on many important public and international questions is largely the same, and by reason of Canada's relation to the British Empire much can be done by us to bring these great sections of the English-speaking peoples together. Meetings of this kind at which representative Canadian and American lawyers are present are bound to produce good results, and are greatly to be encouraged.

I do not think it is out of place to say a word of appreciation at the truly wonderful and far-reaching results achieved by the disarmament conference at Washington, which has just concluded its labours. It is quite the most important conference from the standpoint of insuring the future peace of the world that has ever been held. The fact that the principal seapowers of the world have definitely declared a long naval holiday, and have fixed the ratio of their naval armaments and have come to other pacific agreements

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on questions that might prove occasions for war gives a slight idea of just how immense and radical are the decisions which have been come to at this conference. That Britain, which for generations has boasted of being "Mistress of the Seas" has put herself in the position of not being able perhaps to further continue the boast indicates the unselfish purpose by which she was actuated through the conference. The way in which representatives of the British Empire and the American Government have worked in such perfect harmony has been the dominating factor for success throughout, and great credit should be given the Government of the United States for initiating and carrying to a successful conclusion this epochal event. I think it worth pointing out that over one hundred years ago Britain and America instituted what might be called the first great disarmament conference, which was also held at Washington. I refer to the Treaty commonly known as the Rush-Bagot Treaty, negotiated in 1817. By that treaty the naval forces of the British Empire and the United States on the Great Lakes, which form so largely the boundary between Canada and the United States, were defined and limited, with the result that to-day not a single gunboat, fortification or other implement of defensive or offensive warfare is to be found over the three thousand miles of boundary line between these two great countries.

Another notable landmark in the history of the amicable relations between Canada and the United States was the Treaty entered into at Washington on the 5th day of May, 1910, between Great Britain and the United States, the object of which in the words of the Treaty was "to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other along their common frontier *and to make provision for the adjustment and settlement of all such questions as may hereafter*

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arise." Provision is made in the Treaty for the appointment of an International Joint Commission composed of six members, three on the part of the United States and three on the part of Canada. All questions covered by the Treaty, or matters of difference arising between the two countries, are to be referred to this Commission either for determination or for report. Shortly after the Treaty was entered into the members of this joint commission were appointed and the Commission has ever since been performing its duties under the Treaty. A number of important questions pending between the United States and Canada have been referred to and satisfactorily disposed of by the Commission.

If the examples thus set for the settlement of disputes between Canada and the United States were adopted by the other nations of the world it undoubtedly would put an end to war. We have had one hundred years of peace and goodwill with our neighbours, a happy condition, which I hope and expect will prevail for all time.

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OUR LONDON LETTER.

3 DR. JOHNSON'S BUILDINGS,
Inner Temple, London.

As many of your readers are aware, the details of civil as well as of criminal cases are freely reported in the English newspapers, and the columns devoted to the day's "Law Reports" are read with as much eagerness as the sporting or commercial pages. Naturally, there is a good deal of difference in the "news value" of various cases, but libel actions in which well-known men figure rank in this respect almost as high as murder trials or society divorce petitions.

Several libel actions of more than ordinary interest have recently been before the courts. The Duke of Northumberland and *The Morning Post* have been co-defendants in an action brought by a labour extremist who objected to being branded as a dangerous agitator and a Bolshevik; the Rt. Hon. J. H. Thomas, the secretary of the National Union of Railwaymen, sued the editor and publisher of *The Communist* for having described him in various articles and cartoons as a traitor to organised labour; and Lord Alfred Douglas and Mr. Horatio Bottomley, M.P., have been plaintiff and prosecutor respectively in civil and criminal proceedings against those who had published uncomplimentary remarks about their somewhat chequered careers. All these cases have been followed by the public with intense interest, and the interest of lawyers has been hardly less, for some nice legal points have been raised.

The Duke of Northumberland had no difficulty in justifying every challenged statement in the articles which he had contributed to *The Morning Post*. The case would hardly be worth mention except for the fact brought out in evidence that the plaintiff had been employed by two separate Government depart-

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ments to play the spy on his Bolshevik comrades, and had for some time been paid by each for duplicated copies of a "weekly report" which he had concocted partly out of the columns of the highly respectable, ultra-conservative *Morning Post,* and partly out of his own fertile imagination!

In the action of Mr. J. H. Thomas, M.P., against *The Communist,* heard by Mr. Justice Darling and a special jury, there was an interesting discussion about the responsibilities which a man undertakes on being sworn a member of His Majesty's Privy Council. Both his lordship and the plaintiff are members of that august body—the first by virtue of his position as senior puisne judge of the K. B. D., and the second by virtue of his position as one of the leaders, probably the ablest and sanest leader, of the Labour Party—but it is by no means certain that they take the same view of their obligations.

The case arose out of the recent disastrous coal miners' strike. Some years ago the railwaymen, under Mr. Thomas, had formed a trade union "Triple Alliance" with the miners and the transport workers; and when the miners came out on strike a few months ago, they confidently expected their two allies to follow their example, thereby paralysing at one blow the industrial life of the country. Mr. Thomas, however, disapproved of the precipitate and provocative action of the miners; and, with great moral courage, he succeeded in keeping the railwaymen and transport workers from joining in. For this he was applauded by a grateful country, but he was execrated by the extremists in every trade union and especially by that insignificant body of communists who openly boast of their spiritual alliance with Lenin, Trotsky and the so-called "Third International." For weeks their organ, *The Communist,* vilified him in every possible way, describing him as the modern Judas Iscariot in the pay of the capitalists, the betrayer not only of the miners but of the whole body of workingmen. It is but fair to say that the communists have always main-

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tained that no labour leader can be at once loyal to trade unionism and true to his oath as a Privy Councillor. This oath, as Mr. Justice Darling pointed out, is something very different from a mere oath of allegiance, as its terms show:

"You shall not know or understand of any manner of thing to be attempted, done, or spoken against His Majesty's Person, Honour, Crown or Dignity Royal; but you shall lett and withstand the same to the utmost of your Power, and either cause it to be revealed to His Majesty Himself, or to such of His Privy Council as shall advertise His Majesty of the same."

Mr. Thomas admitted that strenuous efforts had been made to bring about a strike of the "Triple Alliance;" that out of such a strike a revolutionary movement might easily have developed; and that, in spite of having this knowledge, he made no communication either to the King or to any other Privy Councillor. In his opinion, he could best fulfil the spirit, if not the letter, of his oath by exerting all his influence in the secret councils of the "Alliance" to prevent a general strike; and, if he had failed in this, he would have withdrawn from his union and done his utmost in defence of public order and the constitution. The jury evidently took the view that he had been loyal both to his sovereign and to organized labour, for they found for him and assessed his damages at £2,000—a most popular verdict.

The action of Lord Alfred Douglas arose out of a false report of his death published by *The Evening News*, one of the papers controlled by Lord Northcliffe. It is recorded that a former Lord Chancellor, Lord Brougham, was once at some pains to set in circulation a report of his own death in the vain hope that he might have the pleasure of reading in *The Times* a glowing appreciation of his character and multitudinous talents, and your readers will also remember that when a similar rumour got abroad about Mark Twain, he contented himself with announcing that the report of his death was a "gross exaggera-

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tion." Lord Alfred, however, as a Douglas and the son of a Marquis of Queensbury, comes of fighting stock; and, though unmoved by the premature chronicling of his demise, he took strong exception to the appended paragraph in which *The Evening News* summed up his life. This paragraph was by no means unkindly in its general tone, but it referred to Lord Alfred's discreditable association with Oscar Wilde as the chief incident in his career.

It will be recalled that the exposure of Wilde was brought about by the desperate efforts of Lord Queensbury to save his son from what he believed to be a pernicious friendship. When Lord Queensbury, on a postcard addressed to his club, accused Wilde in blunt Anglo-Saxon of the grossest offence, that misguided genius felt it incumbent on him to bring an action for libel. The libel was justified by evidence that not only resulted in a verdict for the defendant, but also led directly to the plaintiff's prosecution, conviction and imprisonment. All that happened twenty odd years ago, but during recent years there have been many echoes of this *cause célèbre* in the courts, due in some measure to Lord Alfred's rather litigious disposition.

To return to his latest appearance in the High Court, Lord Alfred sued the editor and publisher of *The Evening News* for having libelled him in their obituary notice. The defendants entered a plea of justification. In cross-examination, the plaintiff readily admitted his early association with Oscar Wilde both before and after his imprisonment; but his counsel contended that it was libellous for any paper to comment on that association without adding that, in the intervening years, Lord Alfred had repeatedly expressed in his writings the strongest condemnation of his own youthful conduct and of Oscar Wilde's pernicious influence in life and letters. To concentrate the attention of readers on this scandalous chapter from his undergraduate days, while passing in silence not only over his avowed contrition, but also over his

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honourable achievements as a poet and *litterateur*—what was this but to hold the plaintiff up to hatred, ridicule and contempt? The defendants, it was argued, could not escape liability merely by proving the literal truth of each separate statement they had made: if a newspaper undertook to review a man's career, it must hold the balance fairly between the good and the bad. Judge and jury adopted this broad principle and awarded Lord Alfred £1,000.

Mr. Horatio Bottomley, M.P., the prosecutor in the last of these libel cases, is a national figure. His career has been one of violent ups and downs, and he has played many parts from gambler to moralist, from court reporter to company promoter, and from bankrupt to leader of a parliamentary group. He would be the last person to suggest that his life had been blameless, but he might well lay claim to the typical British virtues of courage and good humour, sturdy patriotism and hatred of cant. Where his numerous friends and enemies might be least likely to agree would be on the fundamental question of his honesty. Of his ability there can be no doubt. Few laymen have had more first-hand experience of the law than he—especially as defendant—and he has repeatedly conducted his own case with a skill and a self-assurance that proved too much for the distinguished counsel opposed to him. As founder and editor of *John Bull*, a twopenny political weekly, he wields a great influence among the less educated classes; and he has used this to promote various schemes, both charitable and otherwise.

The particular scheme which let loose the flood of litigation that now threatens to submerge him was the Victory Bond Club. As British Government bonds were not issued in smaller denominations than £100, which was far beyond the investing powers of many people, Mr. Bottomley invited the public to send their savings to his Bond Club, which was ready to accept subscriptions of any size down to a pound sterling. The money subscribed was to be invested in

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Government bonds at their current market price and each subscriber was to be entitled to have his money back on demand. The interest that accrued from the Club's investments, instead of being credited *pro rata* to the individual subscribers, was to be distributed at regular intervals in the form of large cash prizes to those fortunate subscribers whose numbers were "drawn" for this purpose. This scheme appealed, not only to the patriotism of *John Bull's* readers, but also to their business and gambling instincts. Subscriptions rolled in from all parts of the kingdom to the amount of many thousands of pounds. Unhappily for the success of the scheme the authorities declared the "draw" to be a lottery and therefore illegal.

Worse followed, for a man named Bigland began to flood the country with pamphlets impugning Mr. Bottomley's honesty, recalling the more questionable features of his financial past, and declaring his Bond Club to be an impudent fraud. Bigland urged all subscribers to demand their money back forthwith; and, when thousands began to follow his advice, the Club's difficulties were multiplied by a serious slump in the market price of the bonds. This meant a substantial loss on each bond realized. Mr. Bottomley announced that he would see all subscribers repaid in full if only they would have patience, promising to make good out of his own pocket the loss on the sale of the bonds to the tune of over £30,000. Subscribers, however, continued to demand their money back, many of them starting County Court actions all over the country, until at last receivers were appointed by the Court of Chancery to wind up the affairs of the Club.

In the meantime, Mr. Bottomley began the prosecution of Bigland for criminal libel. The case, so far as it has been revealed in the preliminary hearing before the senior magistrate at Bow Street, contains nothing to interest the lawyer in its main aspects, but a very puzzling point has arisen out of a side issue. Bigland was committed for trial at the Old Bailey in January, and while on bail he has repeated in other pamphlets his very uncomplimentary remarks about Mr. Bottom-

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ley. A motion was accordingly made to commit him for contempt, in that he was prejudicing the fair trial of the action. The High Court granted a rule *nisi*, but since then Sir Ernest Wild, K.C., who is in charge of Mr. Bottomley's case, has presumably given more careful consideration to the law on the point, for no steps are being taken to have the rule made absolute.

Lately several of the more sensational newspapers have been heavily fined for prejudicing trials. In each case, however, the question has simply been whether the accused in fact committed a specific past act. In libel, however, totally different considerations arise where justification is pleaded. The right of free speech is involved. On a matter of public interest every man has the right to speak the truth, however disastrous it may prove to another; and, if the plea of justification succeeds, a committal for contempt would deprive him of that right. So in libel, unlike other cases, the court has the difficult task of balancing rights. If, by launching a prosecution for libel, a man can stifle criticism until after the trial, grave public injury might be done—at election time for instance—if the criticism should turn out in fact justified.

The right of free speech has never found the law of libel an agreeable companion. On legal principle the meaning of a written document should be for the judge alone and should be no concern of the jury. Yet Fox's Libel Act, which leaves the "general issue" to the jury, is rightly regarded as a very important guarantee of the liberty of the subject; and the tendency of legislation has steadily been to extend the protection of free speech and to restrict the possibilities of abusing the law of libel. Even when the right to have a civil issue tried by a jury was severely restricted during the war, the right to a jury was left unimpaired in cases of libel.

The question of preventing the repetition of a libel pending trial seems never to have arisen in criminal cases where justification is pleaded. The present writer is of opinion that where there is any reasonable possibility of the plea of justification suc-

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ceeding, it would be contrary to the spirit of the common law to commit the accused for contempt for having repeated the alleged libel or kindred libels. For this view there is strong support in civil cases, where the courts have frequently been asked to grant interim injunctions pending trial. So rarely have interim injunctions been granted in libel that on more than one occasion counsel have argued that the court has no jurisdiction to grant them. The courts, however, have steadily maintained their jurisdiction (see *e.g., Quartz Hill Mining Co.* v. *Beall* (1882), 20 Ch. D. 501), while refusing to exercise it. The law is summed up in *Bonnard* v. *Perryman,* [1891] 2 Ch. 269, where a defendant pleaded justification for having written of the plaintiff's "plunder of no less than £58,000" and "wretched halo of picking and stealing." North, J., remarked, "If in such a case as this an interlocutory injunction is not granted, I cannot imagine any case in which an interlocutory injunction to restrain a libel could be granted." Yet the Court of Appeal dissolved the injunction that North, J., granted. The principle was laid down that "until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions. . . . We cannot feel sure that the defence of justification is one which, on the facts which may be before them, the jury may find to be wholly unfounded."

The position was tersely summed up in argument by Cozens Hardy, Q.C. (afterwards Lord Cozens Hardy, Master of the Rolls): "In ordinary cases an interlocutory injunction will be granted when there is a case to be tried; in actions for libel an interlocutory injunction will be granted only where there is clearly no case to be tried." The reasoning underlying this rule seems to the writer to be equally applicable when the court is asked to stifle alleged criminal libels, even though the machinery suggested is committal for contempt.

FRANK GAHAN

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NOTABLE CASES NOTATED.

Arbitration—Decision of Umpire how far final:

The case of *Attorney-General of Manitoba* v. *Kelly & Others*,[1] is a decision on a matter of constantly recurring importance in business centres where arbitration is frequently resorted to as a means of adjusting disputed questions of fact, and sometimes of Law. The action originally was brought by the Attorney-General against Kelly and others, to set aside a certain building contract relating to the erection of Parliament buildings in Winnipeg, and for damages, etc. When the action came forward a consent judgment was entered providing for referring certain questions to arbitration, and failing agreement to an Umpire. If the arbitrators agreed, all was well; if they failed, the Umpire's report was to be final and conclusive between the parties; and the amount found by him should be entered for judgment as part of the consent judgment.

The arbitrators failed to agree, and the Umpire made his report. This the defendants moved to set aside or vary on the ground that the Umpire had exceeded his powers. A large sum was involved. At the hearing a further charge of misconduct against the Umpire was added. The Defendants' motion was dismissed, and an appeal was made to the Court of Appeal, which allowed the appeal so far as Mr. Justice Curran refused to vary the report of the Umpire by deducting therefrom a sum of $615,313, for estimated expenditure to complete foundations, etc.

The case reached the Privy Council on an Appeal from so much of the judgment of the Court of Appeal as varied the judgment of the trial Judge. The Defendants further cross-appealed to set aside the report on the ground of the Umpire's misconduct.

Lord Parmoor in the Privy Council laid down some healthy arbitration principles: (*a*) If the submission makes the decision of the Umpire final, the Court will

[1] 38 T. L. R., p. 281.

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not enquire whether the Umpire is right or wrong, unless an error appears on the face of his award, or unless the Umpire himself states he has made a mistake. Here the Umpire did not do this. (*b*) It is equally clear if a specific question of law is submitted to an arbitrator to decide, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to enable it to be set aside. (*c*) Where a question of law has not been specifically referred to an Umpire, but is material to the matters submitted to him, and he makes a mistake apparent on the face of the award, the award can be set aside. No such issue arose in this case.

Sales of Goods Act—Sale by description—"No guarantee" clause:

The case of *Wimble* v. *Lillico*,[8] is one arising under a contract in the following form:—

"We have this day bought for you the following goods: About 1,964 tons of chilean partly decorticated cotton cake, containing approximately 40 per cent. protein, and 10 per cent. oil, but no guarantee of quality. The cake to be in sound mercantile condition at time of shipment."

It was held the goods were not in good condition when shipped, and that there was a deficiency in the protein. The words "containing approximately 40 per cent. protein and 10 per cent. oil" were held to be words of description under Section 13 of the Sale of Goods Act, 1893; and there was an implied condition that the goods must comply with the description. The word "approximately" gave the sellers a certain latitude only; and the protection given by the "no guarantee" clause only extended to a reasonable variation from the mentioned standard. It was held the variation here was substantial; and the case of *Wallis* v. *Pratt*,[9] applied. It was added by the Court: The clause excluding a guarantee was at least ambiguous, and such a vague provision could not be adequate to

[8] 38 T. L. R. 296.
[9] 1911, A. C. 394.

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let a Vendor escape from obligations laid down, both by the Common Law and the Sale of Goods Act, 1893.

Absolute Covenant and Vis Major:

An important and interesting question came before the Supreme Court in *Kerrigan* v. *Harrison*.[4] When the case was first heard, we discussed it in C. L. T.,[5] and we certainly felt then that the judgment of the trial Judge assumed something which the contract did not show had ever been contemplated—an intention to maintain a roadway over which an easement of free user was given for all time and in every eventuality. Erosion or *vis major* destroyed it; and how then should the covenants be obliged to maintain it, or restore it? In the covenant was contained a Grant of Land, that the grantor would maintain a certain road and bridges in as good condition as they were at the date of the grant, and that the grantee his heirs and assigns should have a right-of-way to the lands contained in the grant over the road mentioned, and called Harrison Place. It was along the shore of Lake Erie. The road was destroyed by forces of nature—erosion of the stratum or soil, and the encroachment of the waters of Lake Erie.

Chief Justice Falconbridge in 1920 held that the covenant ran with the land, and was binding, and that the covenantor was under an obligation to protect the road against the forces of nature which overwhelmed it. The Appellate Division reversed this finding, and now the Supreme Court has upheld the Appellate Division, and has given a clear exposition of the law. It is a question which frequently may arise all over Canada where rights-of-way over roads and covenants of this character are common.

The Supreme Court held unanimously: (*a*) That the parties did not contemplate the case of the destruction of the sub-stratum by natural forces of erosion and encroachment; (*b*) that the destruction of the road in that way relieved the covenantor; (*c*) that the parties

[4] 62 S. C. R. 376.
[5] Vol. 40, p. 170.

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contracted for the maintenance of the road on the basis of its continued existence; but, (*d*) on its destruction by *vis major,* all obligation regarding it ceased. The cases cited are: *Taylor* v. *Caldwell,*[6] *Tamplin* v. *Anglo-American Co.*[7] and *Corpus Juris.*[8]

Contract — Statute of Frauds — Receipt and cheque make Memo.:

Peterson v. *Betzer,*[9] is another of the never-ending cases arising under Section 4 of the Statute of Frauds. This case was based on a Receipt as follows: Received from C. Peterson the sum of $100 on deposit for house at 62 St. George Street, $1,400 payable 1st May, 1920, and balance of $2,300 on five-year mortgage. With a cheque given on same day by the buyer to the purchaser thus: Pay to the order of Mrs. A. Bitzer $100, deposit on 62 St. George Street, at purchase price of $3,800, $1,400 payable 1st May, 1920, and assume a five-year mortgage of $2,300.

The vendor failed to complete and eventually returned unused and unsigned the cheque. But the receipt was signed by her; and it was contended the receipt and cheque should be read together as complementary parts of a contract. The trial Judge, Ferguson, held this view, and that the requirement of the Statute of Frauds had been complied with.

This finding the Appellate Division reversed, Sir William Meredith, C.J., dissenting. And the Supreme Court have now restored the judgment of the trial Judge, and the dissenting judgment of Chief Justice Meredith. But it is sad to state that the Supreme Court has only done so by three against two, so that if we reckon the majority judgments of the Appellate Division on the other side, there is still a preponderance of opinion taking it *per capita,* against the decision now rendered. It does not seem possible to admit of much doubt—a cheque given by a buyer and a receipt

[6] 3 B. & S. 826.
[7] (1916), 2 A. C. 397.
[8] Vol. 13.
[9] 62 S. C. R., p. 384.

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therefor by the seller should surely constitute evidence of one transaction, particularly when one of these documents was signed by the party trying to evade performance. To enable a Vendor to escape responsibility in a transaction so palpably plain would be deplorable. The Statute of Frauds was designed to prevent and not to encourage fraud, but it is regrettable to say it is too often used for the latter and not for the former purpose. The only item material to the contract omitted from these documents was the interest; and the Law supplies that by implication.

Constitutional Law—Canada Temperance Act:

The case of *Gold Seal Limited* v. *Dominion Express and Atty.-Gen. of Alberta*,[10] is another case where we get the benefit of very diverse views from the Supreme Court upon our Constitution.

The Canada Temperance Act, 1906, had a clause added to it in 1919—10 Geo. V. c. 8, prohibiting the importation of intoxicating liquor into those Provinces where its sale for beverage purposes is forbidden by Provincial Law. This is called part IV. of the Act. The Defendant in compliance with the Act refused to carry liquor into the Province of B. C.; and then the case came before the Court on a case stated to have it declared that part IV. was *ultra vires*.

It was urged that the amendment of part IV. interfered with the free export and import between Provinces of articles which are the produce or manufacture of one of them, and that it is contrary to section 121, B. N. A. Act. Also that part IV. was an interference with Civil Right, a subject over which the Province has exclusive control. It was also urged that the prohibition did not extend to goods intended for re-export. Chief Justice Davies, after explaining how a fatal defect in putting the amending Act into operation had been cured by Legislation passed before his Judgment, held the amending part IV. of the Temperance Act was *intra vires* of the Parliament of Canada. With

[10] 62 S. C. R. 424.

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this Duff, Anglin and Mignault, JJ., concurred. Their diversified view and reasons are instructive to the student of our still mysterious B. N. A. Act.

The Effect of a Pledge by a gratuitous Bailee:

Blundell-Leigh v. *Attenborough*:[11] This is a curious case to which we have previously briefly referred,[12] wherein were considered and decided the conflicting rights of a Bailor who subsequently became a pledgor and a sub-pledgee who acquired title whilst the original pledgee was only a gratuitous bailee, and in many respects the decision arrived at appears to run counter to well established principles of the law of Bailment.

The facts are briefly as follows:—

The Plaintiff, being the owner of certain valuable jewelry, handed it to one Miller, for the purpose of examination, with a view to a loan by Miller on the security of the jewelry, if he were satisfied with the examination. Miller after obtaining possession of the jewelry, but before making the Plaintiff the proposed loan, pledged the jewelry with the Defendant as security for a loan of £1,000, the Defendant accepting the jewelry in good faith and without notice that Miller was only the Bailee. Two days later Miller lent the Plaintiff £500, upon the security of the jewelry, and the plaintiff signed a note for the payment of £600, in six monthly instalments, allowing Miller, as she believed, to retain possession of the jewelry. Subsequently Miller negotiated the note with one Berners, who gave him £300 for it. At some later period Miller committed suicide. Upon inquiry these facts came to the knowledge of the plaintiff, who paid Berners £400 for the note that he held, and she sued the Defendant for the return of the jewelry without first offering to pay him the amount advanced by him to Miller on the security of the jewelry.

The Court of Appeal held on these facts that the Plaintiff could not recover.

[11] (1921), L. R. K. B. 235 C. S.
[12] C. L. T. Vol. 41, p. 487.

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The principles upon which the Court based its decision were, shortly, as follows:—

Though Miller at the time he pledged to the Defendants was only a gratuitous Bailee, yet the delivery of possession to Miller "was a good delivery for the purpose of creating a pledge." The subsequent pledging by the Plaintiff to Miller "went to feed the Defendants' title," which admittedly, until then, was defective; so that the right acquired by Miller when the Plaintiff pledged to him, related back to the time when Miller got possession, and so inured to the Defendants' benefit.

This doctrine appears to be an adoption of the law of real property, first laid down in *Doe d. Christmas* v. *Oliver*,[13] whereby a grantor of property to which he had not title at the time of the grant is estopped from setting up as against his grantee a title acquired subsequent to the grant; it being said that the subsequently acquired title "went to feed the grantee's title."

It seems to have been first applied to the law of personal property in *Whitehorn* v. *Davidson*,[14] though it is one peculiarly applicable to real property, and in its application to the law of personal property the Court appears to have overlooked the distinction between the effect of delivery of a deed to real estate and the delivery of possession of a chattel.

Moreover, the doctrine in *Doe d. Christmas* v. *Oliver* goes no further than this, that the grantor is estopped from disputing his grant, where he subsequently acquires a title, and has no applicability to the rights of a predecessor in title to the grantor. Miller, had he laid claim to the jewelry on the ground of want of title at the time of the pledge to the Defendants, would have been estopped from pleading his title subsequently acquired from the Plaintiff, and the subsequent acquirement would have "fed the Defendants' title" as against Miller, but the principle of estoppel could have no application against the Plaintiff.

[13] 10 B. & C. 181.
[14] 104 L. T. R. 234.

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Presuming, however, that *Whitehorn* v. *Davidson* is good law, and that the doctrine laid down in *Doe d. Christmas* v. *Oliver* is equally applicable to the law of personal property, nevertheless the Court in the case under review appears to have overlooked a very material fact, which was strongly in the Plaintiff's favour. Miller, when he negotiated the note given him by the Plaintiff with Berners, assigned the debt without assigning the pledge, which formed the security for the debt; in such a case it is clear that a pledgor can recover a pledge from the pledgee; otherwise he would be liable to the assignee for the debt, and the assignor would be retaining the security. On payment of the debt to the assignee, would not the pledgor clearly be entitled to the return to the security?

Again, presuming Miller's title to the pledge was perfected immediately he made the loan to the Plaintiff, he only had the right of a pledgee; which was to retain possession of the articles pledged until the amount of the loan was repaid.[15]

As soon as the Plaintiff repaid the loan, Miller's right to possession was gone. Miller could give no better or greater rights to his sub-pledgee than he himself had in the pledge. The title perfected in Miller when he made the loan to the Plaintiff could be no greater title than he could have had if the Plaintiff had pledged to Miller before Miller pledged to the Defendants, and the title which "fed the Defendants' title" came to an end on payment of the loan made by Miller. Whatever rights the Defendants acquired as against Miller could have no effect on rights subsisting between Miller and the Plaintiff in the absence of notice to the Plaintiff of the defendants' title at the time when Miller's title became perfected. The Plaintiff paid Berners, the person entitled to receive it, the amount of the loan, and thereupon become entitled to the return of the jewelry.[16]

Whether the case under review was rightly or

[15] 22 Halsbury 235.
[16] 22 Halsbury 241.

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wrongly decided, it seems to have imported into the Law of Bailment a complication from which it was formerly free. Delivery of the pledge to the pledgee has always been considered essential to the validity of a pledge, except where the pledgee was already in possession.[17] At the time of the pledging, Miller was not in possession of the pledge, having delivered it to the Defendants, and neither at the time of the pledge to Miller, nor afterwards, did the Plaintiff deliver the jewelry to Miller, unless the prior delivery to Miller as Bailee could be deemed to be a constructive delivery to Miller as subsequent pledge.

A further question which might have arisen, but does not appear to have been considered, is this: If the Defendants had a good title to the jewelry, had Berners a good title to the note? The note was apparently no more than collateral security for the pledge. Berners seemingly became entitled as holder in due course of the collateral security, whilst the Defendants became owners of the main security; neither had notice of the other's claim before acquiring their rights. A similar situation might arise in the transactions which are fairly common whereby a mortgagor of land also gives notes for repayment of the moneys due under the mortgage. The mortgagee assigns the mortgage to one person, and negotiates the notes with another. Must the mortgagor pay both the notes and the mortgage? On the authority of the case under review, apparently he must.

[17] Story on Bailments, s. 297.

B.T.

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BOOK REVIEWS.

The Law and Practice of Bankruptcy in Canada. By Lewis Duncan. B.A., Barrister-at-Law. Toronto: The Carswell Company, Limited.

Since the Bankruptcy Act came into operation in 1920, the need for a reliable work such as Mr. Lewis Duncan has now supplied, has been growing more urgent. But the author has not stopped at necessities; he has given us a work which not only reflects credit upon himself, but a work which every member of the Profession will, or ought to, appreciate.

It is the work *par excellence* on the Law and Practice of Bankruptcy in Canada; and it will, we are sure, pass into many future Editions, for its basic structure is simply superb. Clearness and comprehensiveness characterize the work from beginning to end; and the introductory and historical Chapters, including Chapter V. on Bankruptcy Administration, and Chapter VI. on the Position of the Trustee under the Bankruptcy Act, are ideally luminous, especially to practitioners, who owing to the novelty of the Law, are just familiarizing themselves with it.

Bankruptcy Law is essentially a Law of administration; but many questions involving some of the highest principles of Equity present themselves; and these the Author, with admirable terseness and lucidity, discusses; and for their solution presents us with a pungent array of references to English and Irish decisions, and, of course, to every Canadian Case touching the problems involved, right down to last October.

The Bankruptcy Act, as we know, is largely founded on the English Act of 1914; and the Author has provided us with a complete Table, showing in juxtaposition the various sections of the English and Canadian Acts. He follows the same course with regard to the Rules. This foreseeing considerateness on the part of the Author is one of many evidences that the work was primarily designed to be what it is surely destined to be—an indispensable to the practitioner in Bank-

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ruptcy Law. In mentioning this, we should also refer to the Index, which contains some 67 pages, and to the Table of Cases, which occupies 110 pages. The Index we have tested and tried at several places, and it is not only reliable, but it is highly facilitative. In a word: it is perfect.

For the Trustee and others involved in the administration of Bankruptcy Law, this work of Mr. Duncan is also indispensable; and it should be as popular in the Trust Office as in the Law Office.

Having said this for the Author, we should say a word for the Publisher. It is printed and bound in a manner to make it attractive and agreeable to the person consulting it; and that has more to do with the popularity of a Book than some people seem to realize. Admirable works have been impaired by the mechanical work of the Printer and Publisher; but this is not one of them. The work of both Author and Publisher is here in harmony; and both contribute their quota to the success which the Book is sure to achieve.

B.T.

Converting a Business into a Private Company. By Herbert W. Jordan, Company Registration Agent. London: Jordan & Sons, Limited. Toronto: The Carswell Company, Limited.

This is a handy little Book of some 50 pages, which gives skilled and practical instruction for accomplishing what is often desired in Mercantile Companies—converting them into Private Companies. It is a work which requires to be carefully and scientifically done; and it is not every Lawyer who has had experience in carrying such a project through. But this Book supplies the knowledge derived from experience, in a wonderfully terse and yet comprehensive manner. The Lawyer, as well as the Student, and Business men concerned with Incorporated Companies, ought to avail themselves of this really admirable handbook.

B.T.

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EDITORIAL.

Dominion-wide Divorce—Ontario's Anomalous Plight:

An elaborate Annotation ostensibly on Divorce Law, but really on the systems of Divorce in the various parts of Canada, appears in the Dominion Law Reports of the 15th of March last. Its Author is Mr. C. S. McKee, Barrister, Toronto, and he gives interesting historical details as to how some of the old Colonies prior to 1867 adapted or enacted English Divorce Law or substitutes therefor, and expedients of one kind or other for its administration.

On Mr. McKee's own showing Ontario is the great delict. It stands in gloomy anomaly among all the other Provinces, though in most matters it claims to be more advanced than any of them. In matters of Divorce, however, it was too *super-sanctus* to countenance anything that might savour of "putting asunder" those whom "God hath joined together." It consequently abstained from all legislation on the subject of Divorce. The absence of Law, however, did not eradicate the evil; and when relief became necessary the Legislature itself prior to 1867 did not scruple to employ its powers to dissolve marriage contracts as they were, one by one, brought before it by aggrieved spouses.

If the Province had had any Law for this course it would have continued after Confederation. But it had none; and the B. N. A. Act, 1867, ended any power it previously had of making a Law for itself. How far

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it had the English Law it never stopped to inquire; but after Confederation it inaugurated the system of getting dissolutions of Civil Contracts of Marriage through Private Acts of the Parliament of Canada just as it had previously done through the Colonial Legislature.

Whether this is legal or not is the most crucial question for Ontario to-day. It touches not merely her Law but her morals, and the social status or position of parties who have been divorced, as it is called, in this way; and of their children by second marriages. It does not seem that Ontario ever inquired as to the legality of Parliamentary Divorce. Her Lawyers have made an assumption that it is all right, and have followed up the system with ever augmenting patronage year after year.

Ever since the present writer successfully assailed, and proved the hollowness of, the corresponding assumption that the Western Provinces were, as regards Divorce Law, in the same plight as Ontario, the existent system of Parliamentary Divorce has been in constant controversy. Not only has its legality been impugned, but the structure or system under which it flourishes has, piece by piece, been taken out; and for a couple of years or so it has lain in a heap of debris.

No Canadian Lawyer has ever defended the system, or tried to repiece together the thing argumentatively demolished. Nor, we regret to say, does Mr. McKee. His shirking of the issue is remarkable. His pen was already flowing most eloquently on Dominion-wide Divorce; and towards the end of his annotation he even devotes quite a space to the discussion of the relative acceptability of Parliamentary Divorce and Judicial Divorce. Yet he never vouchsafes a word as to the legality of the existent system of Parliamentary Divorce, or as to the destructive arguments advanced against it.

Even if Parliamentary Divorce were to be established in preference to Judicial Divorce, it would still, we admit, be necessary to enact a General Law speci-

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fying the offences for which a Bill would be entertained by Parliament. For the existent system there is no Law. The Senate have no authority, any more than a cluster of rag-men at the corner of Yonge Street, for what they do; and the Parliament of Canada when it passes an Act dissolving an individual marriage contract is not making a Law: it is not even establishing a precedent. It is dissolving a Civil contract without, and regardless of, Law; and in the absence of a general Divorce Act which Parliament, no doubt, could legally pass, it is entrenching on the exclusive authority of the Provincial Legislature.

The Dominion as an entity is, unlike the Provinces, without Law except what it enacts. It has enacted none; and it has no Law to dispense in regard to marriage contracts. It has no Law against the committing of adultery by married people. Its private Divorce Acts are, therefore, autocratic decrees; and they are not only tolerated but patronized by this constitution-loving country!

Legal Education—University v. *Law School.*

A movement is on foot in some parts of Canada for replacing the Law School by the University, or for placing the Law Department of the University in control of the Law School.

Whether the accomplishment of this would be in the interest of Legal Education or not is a question whose answer, one way or other, is dependent upon, as yet, unstated conditions and considerations.

We take it that there is no intention to abandon or "close-down" the Law School. If such an intention existed or lurked anywhere unseen in the new proposal, we should oppose it as reactionary and ruinous.

I speak, of course, of the Law School as it ought to be. What it is, is another matter. If it has ceased to perform at all, or to perform efficiently, its functions, it must be reorganized and rehabilitated. That is very different from demolishing it.

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Assuming that it is doing its work efficiently why should the Legal Branch of the University supersede it?

The University and the Law School should be auxiliaries. There is no reason on earth why, like the famous gourd, the one should swallow the other.

Legal education, generally, requires to be put on a higher plane if the Profession is to keep its place and its great traditions and is to continue to serve the State—the Nation of Canada—in the great epoch of development which lies immediately ahead.

The make-shift Lawyer and the make-shift system which thumped out in rough-and-ready fashion his meagre equipment in the past have to pass into *limbo*.

It is appalling the class of men whom one encounters as legal practitioners. Is it because the qualification for entry into the profession is so low, or is it because a young fellow who fancies a desk position in preference to a spade and shovel or a mechanic's shop, sees he can earn as much when qualifying for a Profession as he could earn as a bricklayer's apprentice, that he steers his course for a Law Office? It is men of this type who infest us, and they reflect themselves through life by decrying anything like scholarship or culture. They see no good in the one or the other, and insist that the pursuit of either brings no monetary recognition. Such men, instinctively mechanics, never change their spots. But they impair the prestige and weaken the force and influence of the real Lawyer.

There should be no facility given to men of this type to enter the Law, and the only way to restrain them is by setting a high standard both of general education and of Legal knowledge for admission. Our standard is far too low.

In the Universities the system of conferring Law degrees on men who are not graduates in arts—in elemental education—is deplorable. We encounter men everywhere with LL.B. and LL.D degrees who use these appendages as counterfeits for learning; and

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they certainly secure immunities far beyond their intrinsic worth.

It is said a Medical Student can get the M.D. degree without being a graduate in arts; and why should not a Law Student get a Law degree in the same way? There is no analogy. The Medical Profession is essentially empirical. The Legal Profession is the reverse. The mere empiric has really no place in it; and if he is of it, he can certainly never be anything but a mechanic.

The kind of study in the University and in the Law School is, or should be, quite different. The University should be a great exponent of high, broad and wide principles illustrated, here and there, by concrete instances of how they have been applied. It should be very far from a tableizer of Cases.

The teaching of Law by Cases, merely, is pernicious. Law should be taught in principles; and cases should only be employed to clarify, to show the scope and limits of, the principle. By reversing the rule the empiric is evolved. I have met hundreds of them who, the instant a principle-proposition comes up for discussion, will, before they understand or even hear the facts, rattle off the names of an alarming number of cases which, when examined, are almost invariably found to have no application. Cases are only illustrations of principles, and are not themselves Law farther than showing how, in certain states of fact, a principle has governed or determined the rights of litigants.

This is the sphere for the University.

In a Law School under the control of the Benchers a different class of study and teaching ought to prevail.

It is there that practical instruction should be imparted, instruction which will serve the young Lawyer just as soon as he is ushered into the arena of responsibility for his advice, his acts and his opinions. It is there, too, that a sense of the obligations he is undertaking should be inculcated — what a Lawyer owes to his client, to the Court, and to himself.

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There, also, should be kindled a noble enthusiasm to excel —to excel by merit and by character and not by adroit manipulation.

There is no sphere in the world where the code of honour should have so high a currency as in the Law. The Dean or Lecturer in the Law School should be so permeated with the highest ethics that he will inevitably transmit them to, and transfuse them into, his Students. His life and record should be an illustration of their sterling efficiency.

The Professor in the University is farther—much farther—removed from the student's life; and he cannot exert anything like the same influence.

Need I say more?

Attendance at the University should be optional. At the Law School compulsory. If one course only is set or prescribed as essential, then there should be two Professors or Lecturers each one having qualifications along the lines here indicated. And above all one of them at least should be a man who reflects high ideals, high attainments, and sterling character.

Bankruptcy Act—Perversion of Jurisdiction.

The administration of the Bankruptcy Act is reposed in the Minister of Justice. It is therefore most fitting that his attention should be drawn to certain irregularities in the carrying out of the Act. These irregularities have become so systematic and persistent that they have passed from the zone of condonable errors into that of deliberate perversions or evasions of the Act. As this is a serious statement to make I will substantiate it by particulars.

While the Bankruptcy Law is Dominion-wide the jurisdiction over it is divided among the Provinces, each one of which is made a District for this purpose. The Supreme Court of each Province is made the Bankruptcy Court. This is the "Court which is invested with original jurisdiction in Bankruptcy" under the Act; and it is the only Court "having jurisdiction in the locality of the debtor."

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"The locality of the debtor" is defined by section 2 (x) to be "the place within a Bankruptcy division or district whereat the debtor has carried on business at any time during the 6 months immediately preceding" the Petition or Assignment, "or where the greater portion of the property of the debtor is situate or where the debtor resides." This definition includes a Bankrupt *simpliciter,* an authorized Assignor, and a person proposing a composition, extension, or arrangement with his Creditors.

It is to "the Court having jurisdiction in the locality of the debtor" that Petitions for adjudication in Bankruptcy must be presented (section 4 (4)).

It is to the jurisdiction of this Court the Authorized Trustee under section 9 is amenable: for first of all he must himself be a Trustee with authority in the locality of the debtor; and in the next place he must submit himself to its jurisdiction by filing therein the Authorized Assignment under which he purports to act.

This Court, too, is *ex necessitate* the Court having the jurisdiction over any proposal for a Composition, Time Extension, or other arrangement under section 13. This section deals with proposals both before and after a Receiving Order or an Assignment.

Whether the proposal is made before or after a Receiving Order or an Assignment, it must be approved by "the Court." If it were made after either of these, the debtor would be already within the jurisdiction of the Court of his locality in the way I have just pointed out; and it could not be suggested he could get an approval of his proposal from any other Court. That would be to oust one Court by another. If the proposal were made before either a Receiving Order or an Assignment it would still require approval of "the Court;" but as this Court has the power to refuse its sanction to the proposal and to adjudicate the debtor a Bankrupt it must *ex necessitate* be "the Court having jurisdiction in the locality of the debtor" that is here meant and indicated. The word "Court" through-

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out the section is used indiscriminately with regard to proposals of Composition, etc., made both before and after the Receiving Order or Assignment; and it must be the same Court in both cases, and can be no other than the Court of the Debtor's location.

Outside the specific provisions, there can be no doubt under the scheme of the Act that the "Court of the locality of the debtor" as defined, is the only Court with original jurisdiction in any matter under either sections 4, 9 or 13 of the Bankruptcy Act. This jurisdiction cannot be displaced nor can it be divided with any other Court; and all proceedings must be subject to it wherever judicial action is necessary.

The auxiliary provisions of the Act by which the Court is to enforce or aid the Orders of another Court are themselves confirmative of this view, just as is the authority to transfer proceedings from one Court to another, "provided the proceedings were commenced in the Province of the Debtor's locality;" that is in the Bankruptcy Court "having jurisdiction in the locality of the Debtor."

The proper exercise of the original or originating jurisdiction is fundamental to every part of the Act.

In face of this it is impossible to find an excuse for what I am about to state.

Compositions and other arrangements by Traders and Debtors in Saskatchewan and Alberta are frequently carried through in Manitoba, where, very often, the bulk of the Creditors are located.

As I said in my article in the March issue, it might sometimes be more convenient to hold a Meeting of Creditors in Manitoba if it were permissible under the Act; but I am of opinion the Act does not contemplate or authorize such a course. As I am not bent on peccadillos, however, I waive that; and assume, for the present, it is legal to hold a meeting of a Saskatchewan Debtor's Creditors in Manitoba. The serious part remains. When these arrangements are carried to the satisfaction of the Creditors, approval of them is obtained from the Bankruptcy Court in Manitoba.

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They are never submitted to the Court having jurisdiction in the locality of the Debtor, that is the Court of King's Bench of the Province of Saskatchewan which is constituted the Court of Bankruptcy in that Province.

The fact that the locality of the Debtor was outside Manitoba can surely not have been brought to the notice of the Court in Manitoba. If it had the Court would certainly have abstained from such a stultifying proceeding. The Order can certainly have no validity in such cases.

Then again: Assignments are frequently obtained from Debtors in Saskatchewan and Alberta by Trustees who are adjunct organizations of Traders and credit-giving Merchants and whose head office is in Manitoba. These Trustees have, in some cases at least, only the semblance of an office or location in Saskatchewan or Alberta; and after they get the Assignment they carry through all the subsequent proceedings in Manitoba. The Notice of the Assignment required by Section 11 (4) to be published in a "Local Newspaper" is inserted in one of the papers published in Manitoba in spite of the fact that a "Local Newspaper" is by section 2 (W) defined to be "a newspaper published in and having a circulation throughout the Bankruptcy district or division which includes the locality of the debtor."

This conduct is defiant. But there is more. The Assignment which under section 10 (A) of the Act the authorized Trustee is required within four days after its making to file in the Court having jurisdiction in the locality of the Debtor, is in numerous cases either not filed at all or filed after months have elapsed.

I have evidence placed before me of one Manitoba Trustee who, according to the *Canada Gazette,* had received over a dozen Assignments from Saskatchewan Debtors during the months of January, February and March, 1922; and who had grossly failed to comply with the requirement of the Section I have named.

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Whether the Assignments are yet filed or not, I do not know.

It is not only the illegality of what I have stated that appeals to me, but the audacity of the Trustee who deliberately violates the Act of which he is appointed the administrator in a trust capacity. It is possible, but it is hard to believe, that such a Trustee has had no legal advice. Be that as it may, the conduct reflects no credit on the designer of such schemes as I have named.

There seems to be only one remedy. A Trustee should not be appointed with authority in more than one Bankruptcy District. Section 14 (2) should be amended accordingly, and an addition made to the Act that all proceedings, whether under a Receiving Order, an Assignment or a proposal for a Composition, Time Extension or other arrangement, should be conducted and carried out in the locality of the debtor unless the Judge of the Court having jurisdiction in that locality should authorize a meeting of Creditors to be held for purposes of convenience in some other district or locality.

B. T.

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CANADA'S SUZERAINTY OVER THE WEST.

PRIVY COUNCIL VIEWS ON THE USURPATION.

By Bram Thompson, Barrister-at-Law, Regina.

That the Dominion is a Suzerain over the West and an usurper of the lands of Manitoba, Saskatchewan and Alberta was first proclaimed and proved in the Canadian Law Times. It was in the year 1919 that my articles first began to appear. The first one presented *Canada's Suzerainty over the West*,[1] and the second one, immediately after, exposed *Our Bogus Dominion Land Code*.[2] Subsequently articles on *Canada's Distorted Constitution* in 1920 and 1921,[3] were largely architectural developments of the basic structure laid down in the first two; and, happily, without alteration, it has borne them all, and even now gives no indication of yielding to their superincumbent weight. So far from that, they all cohere so completely that they present the appearance of a massive rock—truly a Tarpeian Rock for some people—striking up from depths profound in symmetry and splendour.

When this great structure of Truth was erected in 1919 just where it stands to-day, chaos reigned supreme—jarring sounds, confusion of tongues, and a veritable "Babel of balderdash"—(I have used the phrase before). The ferment until recently showed no sign of quelling or abatement; and I had begun to despair of its bewildering wail and of the recognition by the Country of the newly erected fabric of Truth in, at all events, my own day. But the gods sometimes are generous to the World's benefactor, however sordid or obtuse his fellow-man may be; and the gods, happy am I to say, have smiled on me from behind the arras screen, though sombre shades of men's dogged

[1] C. L. T. Vol. 39, p. 417.
[2] C. L. T. Vol. 39, p. 494.
[3] C. L. T. Vol. 40, 41, 42, *ubi*.

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obliviousness still strive to hide or obscure the patriotic work accomplished.

My requital has come through a splendid affirmance or vindication of all I have done, or put forward on the Constitutional Rights to their Land and Natural Resources of the Provinces of Manitoba, Saskatchewan, and Alberta. It has come from the highest of all sources—the Privy Council; and it has come in the most unexpected manner.

It was rendered in the course of the argument before the Privy Council of the Great West Saddlery Company's case relating to the Provincial control over Companies incorporated under the Dominion Companies Act. The case will be found reported (1921) 2 A. C. 71 and (1921) W. W. R., Vol. 1, p. 1034.

These reports, however, do not contain any reference to the vindication referred to, and indeed I was entirely unaware of it until a few days ago I got Mr. E. R. Cameron's Book, recently published by the Carswell Company Limited, Toronto, which contains (*inter alia*) a reprint of the verbatim report of the argument in the Great West Saddlery Case before the Privy Council.

This vindication is to be found at page 155 and following pages of Mr. Cameron's Book; and the following is a true excerpt of what is there set out:—

Viscount Haldane: All land in the Province is in the Crown in right of the Province, unappropriated land.

Mr. Wegenast: Not in Manitoba and Saskatchewan.

Viscount Haldane: You say not in Manitoba and Saskatchewan?

Mr. Wegenast: No, my Lord.

Viscount Haldane: They are surely both set up as provinces under the British North America Act.

Mr. Wegenast: Not in that sense, my Lord.

Viscount Haldane: You surprise me very much. Where is the section in the Dominion Act which puts the title of the land in the Province?

Mr. Wegenast: The Crown lands in Saskatchewan and Manitoba are held in the right of the Dominion.

Viscount Haldane: There may be, of course, Crown lands—Indian lands, for instance—as to which there is a statutory provision, but all I can say is that the general character of the distribution of powers between the Crown and the Province, between

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the Dominion and the Province in Canada, is that there is a common Crown advised by different Ministers, but that the titles to the land of Canada were not appropriated as in the Crown, and it is in the Crown in the right of the Province, where it is not expressly conferred on the Dominion.

Mr. Wegenast: Yes, my Lord, but I may still succeed in carrying on the Saskatchewan and Manitoba cases on that point.

Viscount Haldane: We are not dealing with the Crown lands here.

Mr. Wegenast: But, my Lord, we are not dealing with the power to pass Mortmain legislation.

Viscount Haldane: That has nothing to do with it. The Crown is entitled to the land and the whole question is: Is the Crown advised by the Government of the Province or the Government of the Dominion in exercising that right of property? Of course, if there are Statutes saying that something is Crown land and given to the Dominion in right of the Dominion that is another matter. You have something of the kind in the case of the Indian Reserves, but generally speaking land is in the Crown in the right of the Province.

Mr. Wegenast: Yes, generally speaking, in case it should come up as important in your Lordship's mind, would your Lordships take a reference to the passage in Lefroy dealing with the matter?

Viscount Haldane: Well, you just read what Lefroy says.

Mr. Wegenast: He says in effect what I have said.

Viscount Haldane: But I would like to hear just what he says, Mr. Wegenast.

Mr. Wegenast: In a note to page 708, he says, referring to section 109 of the British North America Act——

Viscount Haldane: Which is a special section.

Mr. Wegenast: "This section, of course, applies *mutatis mutandis* to the other provinces admitted into the Union since Confederation, other than Manitoba, Alberta and Saskatchewan where the public lands are still retained by the Dominion."

Viscount Haldane: Just show me the provision in the British North America Act or any subsequent Imperial Statute under which that is so because it is a very extraordinary proposition. It is not a question of conveyancing. There is only one Crown in Canada for the Province and the Dominion—and only one Crown for the Empire. The title to the public land is vested in that, and the only question is what set of advisers advises it. If you could show me that there is a provision that the Crown is to be advised by someone else than the Government of this Province, well and good. If that is only a provision that certain public lands are to be invested in the Crown by the right of the Dominion, that is a different matter.

Mr. Wegenast: Yes, that is so, my Lord. The subject has been canvassed in Canada, and there are opinions both ways. I simply raise the point.

Viscount Haldane: Heaven forbid that we should have it argued here at short notice, but surely you can tell me if there is some provision in the British North America Act or in some

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other Imperial Statute saying that with regard to the Crown lands.

Mr. Wegenast: The sections are set out here, my Lord.

Viscount Haldane: Perhaps Mr. Nesbitt may know something of this section. Is there such a section, Mr. Nesbitt?

Mr. Nesbitt: No, my Lord. I think what my friend has in mind is this: These three provinces were carved out of what was known as Rupert's Land.

Viscount Haldane: Yes, out of the North West Territory.

Mr. Nesbitt: And the Dominion claims that except so far as the area was granted, which would be all this area in dispute——

Viscount Haldane: Except so far as these provinces were carved out of the North West Territory it would remain under the Dominion?

Mr. Nesbitt: Yes, my Lord, that is how I understand it.

Mr. Wegenast: No, my Lord.

Mr. Nesbitt: Except so far as granted to the provinces.

Mr. Wegenast: I do not want to be too cavilier in dealing with my friend's argument.

Mr. Nesbitt: I am not going even to discuss this point, because I do not think it has any possible bearing on this case.

Viscount Haldane: I think there is a much more fundamental question here, which is: when the Provincial Government was set up and the land vested in the Crown, within the boundaries for that Province, how can the Crown be advised by any other Government?

Mr. Wegenast: It is the greatest issue as between the Western Provinces and the Dominion at the present day. Every man traces his title back from the Dominion grant.

Viscount Haldane: No doubt, because he traces it back to the time when the North West Territory was administered by the Dominion of Cánada, but since the Province has been set up, I should be very much astonished to hear that in the case of any ordinary land, which is subject to the disposition of the Province, that there was any title by charter, which came from anybody but the Lieutenant-Governor on behalf of the Crown.

Mr. Wegenast: It is so, my Lord. All the unoccupied land in these three Western Provinces are subject to be granted out from time to time by the Dominion.

Viscount Haldane: You are telling me something I did not know, Mr. Wegenast, and something which is very astonishing to me. I am assuming this is land which is within the Province of Canada. It may be taken out like the Indian Reserves.

Mr. Wegenast: No, my Lord, it is all the Crown lands.

Lord Sumner: Is it section 21?

Mr. Wegenast: Yes, my Lord.

Viscount Haldane: Crown lands?

Mr. Wegenast: All the unoccupied lands are still held by the Dominion, and it is a burning question between the Dominion and each of these three provinces, the provinces urging constantly that these Crown lands should be handed over to the provinces for administration and for sale, but there is no doubt

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as to the effect. If your Lordships were to want to take out a quarter section of land in Manitoba your Lordships would have to apply to Ottawa.

Viscount Haldane: It is very extraordinary. You have set up a Government, and a new Province, and you have taken away what has been the right of advising the Crown in respect of land within the boundaries of the provinces

Mr. Wegenast: Of course, my Lord, there are two sides to that question.

I do not feel called upon, nor would it be appropriate, to restate here my views and arguments confirmed as they are, in every part, by this remarkable discussion in the Privy Council Those who, even so late as this, wish to acquaint themselves with the arguments I have advanced will find them in a Booklet containing a reprint of three of my Articles and published by the Carswell Company, Limited, Toronto.

It suffices here to say that the Imperial Government in 1870 admitted Rupert's Land and the North-West Territory into the Union or Dominion of Canada established in 1867, and made them two new Members of it "subject to the B. N. A. Act," and for the "purpose of extending the Dominion as constituted Westward to the Pacific." This invested the two new Members or entities with the same rights as the other members or entities; but they had not the capacity or machinery — the people and local institutions — for exercising these rights; and the Parliament of Canada undertook, and was entrusted by the Imperial Government with, the duty of providing this machinery. That was all. It was simply a trust obligation undertaken by one Government in relief of the other. But, appalling to tell, this very trust obligation was instantly perverted into a claim of Ownership; and from 1870 onward the Dominion turned its ungrateful back on facts and truth and on its own constitution, and asserted this ownership in various rights—conquest; cession from the United Kingdom; and purchase from the Hudson Bay Company. The claim grew in audacity as the years advanced. Everybody accepted it as true; School and College Text Books taught it; wri-

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ters on our Constitution expounded on the basis of its truth; and Judges on the Bench assented to its legality. It was an all-prevailing obsession. But it was all fudge —a hollow, subtle, and false pretext.

The readers of the Privy Council discussion, above set out, will see it positively asserted by both Mr. Wegenast and Mr. Wallace Nesbitt. How flimsy and unreal it was, the interrogations and rejoinders of Lord Haldane amply demonstrate!

The Dominion, in exercise of this assumed ownership, established a veritable Suzerainty over the whole West, maintaining it even till this day with unparalleled effrontery; and when it carved out and established the Provinces of Manitoba, Saskatchewan and Alberta it withheld from them their Land and Natural Resources.

The only man I could ever find who made a really heroic and persistent fight against, and patriotic dissent from, the vile and villainous distortion of the Constitution by the Dominion was the Hon. F. W. G. Haultain, who for many years had been Premier of the North-West Territories, and who is now, and for some years has been, Sir Frederick Haultain, Chief Justice of Saskatchewan.

In harmony with the Suzerainty conception, the North-West Territories for some years prior to 1905, had been invested with a Legislature and Government entirely subordinate to the Dominion; and it was Premier Haultain who broke, at all events, that base bond of servitude. In doing so he aimed to achieve for the West the full exercise of its rights under the B. N. A. Act; and eventually, after years of strenuous protest against subordination, he drew up, about the year 1901, a Bill and presented it to the Dominion Government for enactment by Parliament. This Bill gave all the West then under the control of the subordinate North-West Territories Legislature, the status of a Province under the B. N. A. Act. It provided not only for the new Province having its Land, but that it should be compensated for anterior, illegal

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and prodigal alienations of the Land by the Dominion Government; and that it should be exonerated from the exemptions from taxation which the Dominion acting as Suzerain, if not indeed Sovereign, of the West had conceded to Railway Companies and others. It was a Bill of Emancipation.

Though Premier Haultain gallantly fought for these rights for years, both before and after the presentation of this Bill of Emancipation, he was eventually overborne by massive intriguery of political poltroons both in the West and in the East; and in 1905, as stated, they jerrymandered through the Parliament of Canada a Bill of Betrayal—a Bill creating the two Provinces of Alberta and Saskatchewan, both of them being, as Manitoba had previously been, divested and despoiled of their Land, but compensated for it by an annual money dole from the Dominion Government.

It was a mess of pottage for a birthright. But who sold it? Not the Provinces: they were non-existent. Not the people of the North-West: they were not consulted but jerrymandered.

It was a vile act—an act of perfidy. The people of the West did not know their rights, but even if they had known them, and had voted for this Bill of Betrayal, it was still illegal as contrary to the Constitution, and void utterly and absolutely.

The Dominion had no discretion as to the granting or withholding of the Land which automatically, or rather by force of the B. N. A. Act, became the Land of the Province the moment the Province was established. It required no grant from the Dominion, nor could any enactment of the Parliament of Canada prevent this indispensable of Provincial Sovereign rights —the *dominium* over its own Provincial Land.

The whole area was already subject to the B. N. A. Act; and only one kind of Province could be carved out or exist under that Act.

How the converse came to be imposed upon, and accepted by, the People, it is almost impossible to con-

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ceive. But it was a universal belief whenever fate first planted my feet in the Prairies in 1917 that the Dominion owned the West; and that, whether it was wisely done or not, the Parliament of Canada had the right to do what it had done in withholding from the new Provinces their Land and Natural Resources.

A whine, too, at that time was growing more pronounced year by year for the return of the Natural Resources. After 12 years people were beginning to realize how they had been betrayed, and every now and then Political deputations were going to Ottawa begging for the Land. The sham and hollowness of this soon became manifest to me—begging for their own; for the return to the Owners of what had been stolen from them. Disgusting poltroonery! Under a sense of disgust on one side, and of patriotism on the other, in 1919 I wrote the articles referred to which for the first time, so far as I know, stated the true constitutional position of the Dominion and the Provinces in regard to the Lands of the West.

Both the Federal and the Provincial Politicians of every party tried to ignore the truth taught in those articles. They did it right up till and during the recent General Election. But now that the Privy Council has so emphatically endorsed what I said, they can evade the issue no more. They are driven off the field; and it is up to the people of the Provinces to see that they promptly get their Rights from the beginning of the wrong, and that the illegal grants of land made by the Dominion, all through the years, to Railway Companies, political hirelings and speculating syndicates are levelled down; or, if validated, that they are validated by the Provinces themselves upon terms and conditions agreeable and profitable to the people of the Provinces.

It is worthy of note that though the Parliament of Canada illegally withheld from the Provinces of Manitoba, Saskatchewan and Alberta their Lands and Natural Resources, it cannot now pass an Act to restore them, or hand them over, or even to surrender

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its claim, false though it be, to them. Any Act passed by the Parliament of Canada, even with the co-operation and approval of the Provinces, will require to be re-enacted or confirmed or validated by the Imperial Parliament.

How frail was the Suzerainty or Sovereignty of the Dominion!!

BRAM THOMPSON.

Regina, April 8th, 1922.

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LEGAL EDUCATION IN ONTARIO.

By Shirley Denison, K.C.

Legal Education has again been discussed by the Ontario Bar Association at its meetings this year. There have been periodical discussions of this kind once a year at these meetings, and also some discussion at the meetings of the Canadian Bar Association, the latter, of course, taking a wider scope as it affects legal education in the whole of Canada and producing more concrete results because the Association has been able to formulate specimen curricula for various Provinces throughout Canada, though apparently they have not yet been approved by anyone on behalf of Ontario.

These discussions show that legal education has excited some interest in Ontario, though it is suggested that they have been too sporadic and too general to have advanced to any great degree any practical reforms in this important matter. One thing that impresses those familiar with the education of law students as at present conducted at Osgoode Hall is the lack of knowledge of existing conditions here on the part of many who do the discussing.

Very few practitioners in Ontario appear to know or to care very much about the work now being done, though it is submitted that the first step in any reform is to know with some accuracy and in some detail what is the existing system, how it actually works and what results are achieved.

In spite of resolutions and discussions at various Bar meetings in Ontario, there is very little actual intercourse between the members of the Bar and those who lecture or otherwise appear before the students. Special lectures are sometimes delivered to the students by Judges or Barristers who, therefore, have some knowledge of how lectures are actually conducted and what the present methods of the Law School are,

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but with these exceptions it is probably safe to say that not one lawyer in a thousand has ever been inside a lecture room after he has graduated and that not one in a hundred has ever put an intelligent and thoughtful question to a Lecturer as to the progress, aims, and existing methods of the School.

In an experience of lecturing beginning in 1908, the writer only remembers two occasions in which any member of the Bar appeared at a lecture. On one occasion a prominent Barrister dropped in for the last ten minutes of a lecture. On another occasion, the late Mr. Lancaster, M.P., called upon the Lecturer and asked if there would be any objection to his coming into the lecture and hearing how it was conducted. During the same period, it has been a rare occurrence for any Barrister, even though he be a Bencher, or for any Judge to enquire about the Law School, and the number of helpful and thoughtful suggestions for the improvement of their work in the School ever made to any one Lecturer by members of the Bar could probably be counted on the fingers of both hands.

The writer's experience in these particulars has probably been duplicated by all the other Lecturers. It is at least two years since any Barrister has asked the writer any question about the Law School which would suggest any real interest on his part in its actual working.

Of course, it would not be convenient or desirable that the lectures should be inundated by members of the Bar curious to see what actually goes on, but it is suggested that the facts outlined indicate, to say the least, a very casual and intermittent interest in this important work. And it is further respectfully repeated for the sake of emphasis that before reforms in legal education in Ontario can be intelligently discussed, it is necessary to know what is being done at present, what are the advantages of the system now employed and what are its defects.

A mere theoretical discussion of legal education, not based upon a knowledge of what is being done in

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that direction in Ontario or elsewhere, cannot result in any great advantage to the student or to the profession.

The foregoing remarks have been intentionally put in a somewhat personal form, and are intentionally based upon the writer's personal experience, because it is apparent that there has not been sufficient personal touch between the Law School and the members of the Bar. It might be mentioned also that it has not been the habit of the Ontario Bar Association to invite the Lecturers to their meetings when legal education is being discussed, nor, so far as the writer knows, has any Lecturer ever been specifically invited to take part in any such discussion. This is not said with any sense of injury but to enforce again the statement that the discussion in Ontario on this subject is all in the air and is not based upon any sure foundation derived from actual enquiries upon the subject.

The Law School in Ontario will develop, improve and become a leading factor in legal education in Canada if it is backed up and spurred on by wide interest throughout the profession, by encouragement where encouragement is deserved, and by intelligent and constructive criticism, and all members of the Staff would undoubtedly welcome not only encouragement but also helpful criticism.

To sum up the foregoing, it is urged, therefore, that there should be a constant and widespread and not spasmodic and perfunctory interest in the subject of legal education in Ontario, and that this interest should be maintained and informed by definite knowledge of what is taking place at the present time.

It is not suggested for a moment that there is no room for improvement in the Law School as at present conducted. A member of the Staff cannot well enlarge upon the merits of the Law School, but, without doing violence to the modesty becoming to a Lecturer, it must be pointed out that there has been very little, if any, specific criticism of the way in which the work has been actually done, that the Law School is always

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well attended, and since the War has been continually overcrowded, that students come to the lectures from other parts of Canada at considerable expense to themselves, and that order and a close attention to the lectures is a rule which for a good many years past has had practically no exceptions. It is doubtful whether there is in any School a higher standard of courtesy maintained by the students towards the Lecturers. These facts would indicate that the School must be serving its purpose, and doing it at least moderately well.

It is also conceded by a majority of people that the general standard of knowledge in the profession has increased. We are all tempted to think of the great lawyers who studied and practised before there was any Law School, and to compare with them the leading members of the profession to-day, and there are some who think that the giants of earlier days were more gigantic than those whom we see now, but when we examine more closely the way in which cases are handled in Courts to-day by the ordinary practitioner, as compared with the way in which they were dealt with twenty-five years ago, and when we see the facility with which younger men now present their cases to the Bench, the majority of people will probably say that the average of legal knowledge is higher than it was, and some will quite fairly attribute this improvement in general legal standards in part at least to the work of the Law School.

As the country grows, as the demand for legal reforms becomes more insistent, and as legal issues come to centre more and more about large and important transactions, it is obvious that the Law School, in its present form, can hardly cope with the demand for a more complete training of the students. There must always be improvement in the Law School as in all other teaching bodies as time goes on, or it will fail to hold its place, but what direction these improvements are to take is a matter which has not received the careful study in Ontario which the subject demands.

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Owing to our proximity to the United States and our continual intercourse with lawyers in that country, and owing also to the great success and great learning of some few of their Law Schools, we are tempted to look to them exclusively for guidance in dealing with our problems of legal education. We are apt to forget that Great Britain also teaches law and has its system of legal training, and further that some light can probably be thrown upon the subject by the experience of Continental Systems of Legal Education. It is most important to bear this in mind when the question of the Case System in Law Schools is discussed. This has been adopted in some of the great Universities of the United States, and it is said that it has met with great success. We should remember, however, that in the United States the law student attending these great Universities does not usually get any actual practice in the law during the period of his studies at the Law School, and he very often graduates from the Law School as a lawyer ready to practise without having served any practical apprenticeship. Where this occurs, it can be readily understood that the Case system will appeal to both teachers and scholars as the best available substitute for actual training in an office.

It is not the purpose of this article to advocate any particular reforms. It is only desired to refer to some reforms suggested, and to urge that judgment be suspended until fuller knowledge upon the subject is obtained, and until the present absolute lack of definite information which prevails in Ontario on these important questions is dispelled.

There is, for instance, the question of requiring students to devote the whole of their time to the study of the law while attending Law School. At present students spend much of their time in offices, doing work required of them from the members of the firm. Their articles infer if they do not in terms demand that the master shall be more or less a teacher to his student. In many instances this actually occurs. In most

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instances it is forgotten. There is no reason why the master should not devote the time necessary to explaining to the students the reason for the work which the latter are asked to do, but it is urged against our present system that even when this sort of teaching has actually been done, it is too casual and that the student should spend all his time on his studies and not lose time working in an office.

The writer's personal conviction is that not only is it desirable to maintain the present system whereby students spend much of their time in offices doing the actual work which falls to their lot, but that owing to the increase in the teaching of Practical Sciences and of business courses of various kinds in Universities, the trend of modern education is more and more in the direction of combining practice with theory and requiring the students to spend some part of their time in shops or offices where the knowledge which they are seeking to acquire in theory in the classroom is carried out by them in daily life.

Though this article is not intended to uphold any particular form of education, it is urged that a change from the existing system in this respect should receive careful consideration and be made the subject of the fullest enquiry before any change occurs.

Another proposal often brought forward is that all the Lecturers should devote their whole time to teaching Law. It may be as time goes on that this will be found necessary, but it can hardly be denied that, other things being equal, the person who is either engaged in the practice of his profession, or has spent much of his life in active practice, is better equipped for training students to make their living in law than one who has had only a theoretical acquaintance with it. One of the great dangers which threatens the legal education of a student who intends to become a practitioner in the ordinary sense of the term is that his studies may become divorced from the experience which is the daily lot of those who are called upon to advise clients and prepare and argue cases in Court. Technicalities still

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exist in our law and are still relied on by some lawyers, but there has been a wonderful change in Ontario in that respect during the past twenty or twenty-five years. It is difficult to say how far the desire which apparently now exists amongst the lawyers of Ontario to reach the heart of a dispute and to deal with it on its merits is due to the present form of legal education in Ontario, but it is not safe to assume that it has had no part in bringing about the present improved situation and in eliminating waste attributable to the undue importance attached to purely technical procedure and to reliance upon fine-spun but unessential points of law. The real usefulness of a lawyer lies in facilitating the transaction of business, the smoothing out of irritation and difficulties and the presentation to the Courts with as much learning and force as he can command of those points of law or fact which will assist in a righteous decision of the case in his client's favour, if that can be obtained, and it is submitted that in these respects the Bar of Ontario has not been inferior to the Bar of other countries. If the present system of legal education had been entirely defective and required radical changes, the Ontario Bar would by this time have fallen far behind the Bar of other countries. Of course, as the country grows, there should be developed a School for the teaching of law upon its historical and theoretical side where the jurisprudence of other countries, the history of our own Common Law and the higher branches of legal studies can be taught. We greatly need now some institution which will foster a love of learning and the spirit of research in our profession and upon our Bench, but this should be in addition to rather than in substitution for our present methods.

Another change proposed is that the Law School should be transferred by the Law Society of Upper Canada to the University of Toronto and should form one of the activities of that great teaching body. There is a certain sentiment which leads many lawyers to oppose any such change, but the matter should not

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depend upon any such sentimental consideration. The question is whether the student will be better fitted to practise his profession if the teaching of the law is transferred to the University. One advantage of this course would probably be that the Teachers in the Law School would come into closer contact with others interested in the subject of teaching generally. The sense of the nobility of teaching which attracts so many men from more lucrative employments and induces them to devote their lives to this career appears to be highly developed in the University of Toronto throughout nearly all its branches, and if the Faculty of the Law School became another branch of this institution, it might absorb more of that spirit, whereas at present it is cut off from any corporate connection with the University. On the other hand, it cannot be too often repeated that the training of the lawyer who expects to make his living by practising law depends not merely upon what he learns in classes, but upon what he absorbs in daily life in the office, and the Law Society of Upper Canada is much more fitted to properly appreciate this point of view and to ensure that it has its effect upon the teaching of the student.

The matters discussed in this communication are questions of methods and system. Systems of teaching are important just as system is important in other matters because the work must be carried on by people of ordinary capacity and character, but there is probably no calling where the personality of the teacher counts for so much. A superlatively good teacher is always better than any system. The great Athenian Doctors adopted different methods of imparting knowledge to their scholars, but it is the men themselves who have made their names immortal, the systems which they employed merely contributed to their fame. Law students are not children. Most of them are grown up and their characters have passed out of the purely formative stage, but they are still sufficiently impressionable to be immensely affected by the type of man who is addressing them. The search for

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a better system of legal education should never lead one to lose sight of the fact that it is the teacher who counts and that the system is a secondary matter.

It is hoped that nothing in this article will deter others from discussing the improvement of legal education in Ontario or in Canada. It is intended rather to stimulate interest in the subject, in the hope that the profession generally will try to inform themselves, first, as to what the present system is, and secondly, what changes, if any, can be made in it which will result in greater usefulness. The influence and standing of the Law School will be greatly increased and improved if it has back of it an intelligent and well informed public opinion seeking to preserve what there is of good in it and encouraging and assisting it to keep abreast of the times.

SHIRLEY DENISON.

Toronto, March 22nd, 1922.

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ARE JOINT STOCK COMPANIES COMMON LAW CORPORATIONS?

By Bram Thompson, M.A., Barrister-at-Law.

ARTICLE 2: CONTINUATION ARGUMENT.

In our Article on this subject in last month's issue, we were forced to conclude rather *per saltum* than by steps. Considering the difficulty and importance of the subject discussed, we make no apology for now inserting the steps while resurveying to some extent the structure already raised.

Companies incorporated under the Companies Acts of the various Provinces and of the Parliament of Canada as well, are structurally the complete antithesis of the Common Law Corporation. It is best to make this clear.

The Common Law Corporation was an artificial person—a legalized entity fully *sui juris*.

It owed its origin or creation entirely to the exercise by Royal Letters Patent of the autocratic Sovereign Prerogative of the King; and it had the powers and capacities of an individual man to do what it wished so long as what it did was not beyond or prohibited by the Law. It was under no restraint by its Charter, but it was amenable to the ordinary Law of Contracts, Torts, Property and Civil Rights just like an individual man *sui juris*. These powers and capacities were correlatives of each other, and were coterminous; and together they constituted the *status* of the Common Law Corporation as a contractual entity in the State able to create, and able to discharge, obligations. It could neither plead, nor have pleaded against it, the principle of *ultra vires*. So entire and complete was this entity that its constituent members were *quâ* its acts taken no cognizance of by the Law; and they had no personal liability for its obligations.

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Inter se they might have been partners, but *ab extra* they were non-existent.

The Companies formed under the Companies Acts of the Provinces of Canada have no pretence to be Common Law Corporations. They are Statutory creations. They are Joint-Stock limited-liability Companies; and the basic conception of them is that of a Partnership among the members or shareholders. The sphere of their operation is defined and circumscribed; and the liability of the members is limited. Their restraints and limitations both with regard to objects or powers and liabilities are founded upon, and derived from, Partnership principles. They are completely amenable to, and are controlled by, the Equitable principle or doctrine of *ultra vires,* showing that the corporation entity is in some fiduciary relationship to the constituent members of it.

In some Provinces, as in Ontario and Manitoba, these Companies are incorporated by Royal Letters Patent or an equivalent therefor, and in some Provinces, as in British Columbia and Saskatchewan, they are incorporated by the registration of a Memorandum of Association.

Where Letters Patent effect the incorporation, it must be remembered that they are not, and have not the plenary effect of, the Prerogative Letters Patent by which the Sovereign *solus* formerly created Common Law Corporations. They are Letters Patent issued pursuant to a Statute; and such Letters Patent subserve but do not dominate the Statute. In issuing them the King's Representative or Minister obeys the Statute, and brings into requisition only so much of the Royal Prerogative as is necessary for the limited purposes of the Statute. These Letters Patent could not invest the Corporation which they constitute with anything antagonistic to the Statute, though they might import or infuse into the Corporation something not incompatible with, or not prohibited by, the Statute or the general scope of the Statute. This is

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precisely what the Privy Council decided in the *Bonanza Creek Case*. It decided no more.

Except as to this imported or infused something through the Letters Patent, the method of incorporation makes no difference upon the Company. Whether it is incorporated by one method or the other it is essentially a Statutory Company. But the artificial entity evolved, in either way, is not complete. It has not the status, rights or powers or capacities of a natural person. It is not, in other words, a Common Law Corporation with all its ubiquity and all its omnipotence. Nor has it the smallest element of either of these characteristics of the Common Law Corporation.

For the Statutory Company its objects or business, its powers and its capacities are all prescribed and circumscribed by the Statute. Anything done outside the ambit of the Statutory authority is *ultra vires*. Within the Statute the Company is *sui juris* and *compos;* outside the orbit of the Statute it is void of power, equally void of capacity, and utterly *non compos*.

To exemplify, let us take the *Bonanza Creek Case* which has been the source of all our confusion, though it is one of the most beneficial and illuminative of the manifold decisions of the Privy Council. If our legislators had pondered its meaning and learnt its effect before trying to enact the conversational phrases of legal luminaries during the discussion of it, we should not have been involved in the present imbroglio.

The Bonanza Creek Mining Company was limited by the Ontario Statute under which it was formed—limited in objects, powers, and liabilities. It was constituted by Letters Patent issued pursuant to the Statute. This, admittedly, did not make it a Common Law Corporation, or invest it with any right to do any business but the business for which it was created; or to do business in any other place than Ontario, or in any other way than in conformity with the Statute.

The Provincial Act could not have created anything but an orbitally-restricted Provincial Company; and

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the Letters Patent had not the effect of altering this in any way. All it did was to import or infuse into the Statutory Provincial Corporation something of the personality or individuality which pertained to the Old Common Law Corporation formed by the absolute autocratic prerogative act of the Sovereign alone. This something was not repugnant to the Ontario Companies Act, or to the scheme or scope of Provincially-formed Companies. It was not prohibited by the Act, and it was quite compatible with all the restrictions and limitations of the Statutory Company. The Privy Council, distinguishing actual power from competence to acquire power, called this something, which the Letters Patent infused into the Corporation, *capacity*. The Corporation formed in this way had the *capacity to acquire a right* to carry on its business outside the Province of its formation. But it had not the right itself, inherent in itself, to operate outside the Province; and it certainly, by virtue of its Letters Patent Charter, had not the right of altering or enlarging its business, or of acquiring new powers within the Province, except in accordance with the Statute; nor could it disregard or traverse any of the restrictions or limitations of the Statute in any respect whatever. But if it were a Common Law Corporation, by virtue of its Letters Patent Charter, it could not be, and was not, bound to anything or by anything. Even the limitation of the Letters Patent was of no avail in checking its ubiquitous power. Though formed by a Sovereign Prerogative Act in Ontario for a definite purpose and with a limited liability of its members, it could, if it had been a Common Law Corporation, have operated anywhere, any business it liked, without any liability on the part of its members. To give the Bonanza Creek Mining Company the status it claimed in the Yukon, it would have been only necessary for the Privy Council to decide that the effect of the Letters Patent was to constitute the Bonanza Creek Company a Common Law Corporation. The Privy Council did not do this, but *per contra* held the Company had by

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virtue of its Charter no *right* in the Yukon, but had a *capacity* to acquire, and actually had acquired, a right to operate there by complying with the *lex loci*.

Ontario got all it could possibly want by the Bonanza Creek decision—the judicial affirmance in the Corporation, constituted by Statutorily-authorized Letters Patent, of a capacity to acquire extra-Provincial rights to operate its Statutory powers outside the Province of its origin or creation. All Provincial Companies formed in this way were participants in this great decision; and all that Provinces which formed their Corporations strictly within the Statute by merely registering a Memorandum of Association thereof, had to do in order to acquire the same capacity, if they desired it, was to enact what Saskatchewan did itself enact by the first clause of the fatal amendment, namely, that its Companies had "the capacity of a natural person to accept extra-Provincial powers and rights and to exercise its powers beyond the boundaries of the Province to the extent to which the Laws in force where such powers are sought to be exercised permit."

But the Provinces were not satisfied with the ideal or potential position in which their Companies were, by this decision, placed. Ontario and Manitoba proceeded to enact as set out in my earlier article, that their Statutory Companies should have "the general capacity usually attributed to Common Law Corporations;" and Saskatchewan in turn enacted that, in addition to the capacity above set out, the incorporation of its Companies should "have the same effect as if the Company were or had been incorporated by Letters Patent under the Great Seal."

Mr. Justice Bigelow in *Canadian Bank of Commerce* v. *Cudmore,* has interpreted this amendment in Saskatchewan to be identical with the amendments in Ontario and Manitoba. I do not agree; and will state the reasons later on.

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Assuming them to be all identical, I ask: What effect had such an amendment on the Corporations already formed? It was not intended that they should be, but were they by this amendment, transformed into Common Law Corporations? I submit not.

The Statutory Company, even with the amendment, has not and cannot have the status of a Common Law Association. By the amendment it has, at most, only one element of that status — the capacity. The power is absent.

A Statutory Company has no power by implication; and if it has a capacity to acquire power it can only exercise this capacity in accordance with the Statute. It has no capacity *mero motu* to assume power.

The general capacity conferred by the amendment could not create a general power. Nor could it transform the Statutory Company into a Common Law Corporation so as to invest it with the plenary power of an individual person *sui juris;* for that would be to demolish at a stroke the existent structure of the Statute. Outside the amendment, the Company's powers are in the Statute, are limited by the Statute, and could not be extended except in conformity with the Statute—by supplemental Letters Patent, in some cases, and by Special Resolutions of the shareholders in others. The same *mutatis mutandis* may be said of capacities.

Capacity and power are not identical but reciprocal or rather complementary. Capacity without power is inoperative and *vice versa;* and this added general capacity was restricted and confined by the Statutory powers to some condition or exigency in connection with these powers for which the Statute did not provide a specific capacity; but in no case could it be used except in harmony with the Statutory purposes and objects and powers of the Company.

It may take the development of facts to really bring the meaning of the enactment to light. But so far as any facts have yet arisen—the facts for instance

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in *Edwards* v. *Blackmore* and in *Bank of Commerce* v. *Cudmore,* the words are mere verbosity; for the Company, by them, could not have an authority to do anything but what the Statute under which it was created invested it with the power to do. The entity as created could not be transformed or enlarged in its powers by this added capacity.

The capacity of the Common Law Corporation was co-extensive with its power, which was that of an adult person *sui juris* and limited only by the general Law; but it had no capacity apart from that power. Nor could a Statutory Company—which is not a complete person but a corporate agglomeration of partnership interests, directed, controlled and limited in the interest of each one against the aggregation by rigid powers set forth in the constituting Statute — have any capacity apart from those powers. It could not have its Statutory capacity for its Statutory powers, and then have, besides, by virtue of this amendment, the general power and capacity of a Common Law Corporation to do whatever it wished to do—to carry on business, for instance, not within the scope of its Statutory powers and actually prohibited by the Statute under which it was created. This would be absurd. Yet this is what *Edwards* v. *Blackmore* has decided to be the Law in Ontario. If this is the true interpretation of the amendment of the Company's Act, why limit the Corporation at all? It seems doubly absurd to restrict the powers and capacities of a Company with respect to the business which it prescribes for itself and the Statute sanctions when being incorporated, and then, by a few general words, to give it an absolute free hand to do whatever other business either whim or caprice might suggest, and just as a Common Law Corporation could have done. This is the meaning of *Edwards* v. *Blackmore.* And in considering this absurdity, remember that the Common Law Corporation had legality on its side. It had the general capacity to do what it liked simply because it had the power of a complete individual *compos mentis* and *sui juris;*

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whereas the Statutory Company is devoid of any such power. Why give it the capacity when it has not the power of the Common Law Corporation?

That the Legislature in Ontario conferred on its Statutory Companies the status of a Common Law Corporation is the interpretation of the amendment of the Ontario Act made by the Appellate Division in the case of *Edwards* v. *Blackmore*. With every respect, but without any diffidence, I disagree.

Here I submit is the true and better way of regarding this wallopped-up legislative mess: —

Ontario had by the Bonanza Creek decision got the infusion into its Letters-Patent Charter Companies of a capacity to acquire extra-Provincial rights of operating their business. It wanted no confirmative legislation for this. But dazzled by the luminousness of the rays of its new revelation it rushed helter-skelter to enact for its Companies any other capacities which might yet be lurking or concealed in the mysterious casket of the Royal Charter. Manitoba, similarly affected, followed the example. It was more or less of a frenzy. These Provinces did not intend to do what the Ontario Appellate Court says they have done. Their legislation was slobbered and slovenly; but that reflection is no solution. Even if they had preceded their amendments with the words "Subject to the provisions of this Act," all would have been well. But these words are there by implication; for all the Act, and not merely the amendment, must be construed together, so that every word has its true meaning relatively to the whole. Subject to the provisions of the Act, the Statutory Company has in Ontario and Manitoba the general capacity of a Common Law Corporation. I will admit that. But it has no more in the way of power, no larger or other objects or purposes, than it has prescribed for it under the Statute; and the capacity cannot operate beyond these. It was created a legal entity for these objects and purposes alone; and its capacity does not extend beyond them. Its general capacity, therefore, is confined, and only

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applies to them, and enable it to do with reference to them something for which a specific capacity is not prescribed by, but which must be in harmony with, the Statute. It assuredly does not enable the Company to embark in any business not within the clear ambit of its Statutory powers.

Now for the Saskatchewan Amendment.

Mr. Justice Bigelow has held it is identical with the amendments I have just discussed in Ontario and Manitoba; and in *Canadian Bank of Commerce* v. *Cudmore,* he followed the decision of the Ontario Appellate Division in the case of *Edwards* v. *Blackmore.*

With every respect I say that the two amending enactments are radically different, though I believe the variation in the words of the Saskatchewan enactment was made, not intentionally to create a divergence, but adroitly to avert the suspicion that it was merely the work of an imitative copyist. Be that as it may, I am not concerned; for whether the variation in the wording is due to vanity or wisdom on the part of the draftsman, it makes a wide dividing line between the Law in Ontario and Manitoba and the Law in Saskatchewan.

The amendment in Saskatchewan confers upon Provincially-incorporated Companies "the capacity of a natural person to accept extra-Provincial powers and rights and to exercise its powers beyond the boundary of the Province; and . . . such incorporation shall, so far as the capacities of such Companies are concerned, have and be deemed to have had the same effect as if the Company were or had been incorporated by Letters Patent under the Great Seal."

Rightly read, there can be no objection to this enactment.

The whole amendment is one clause, and it is divided into two segments by a semi-colon. The second part merely puts in an alternative way, or in different language, what is already contained in the first part.

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The Companies to which this capacity is added are (*inter alia*) Companies created by or under any general or special Act of the Legislature, and they are consequently Statutory Companies. There is no attempt to give them the general capacity of Common Law Corporations as was done in Ontario and Manitoba. They are, by this amendment, merely given the capacity of a natural person to accept extra-Provincial powers and rights; and then they are deemed to have the capacity of a Company incorporated by Letters Patent;—that is the capacity of a Provincial Company incorporated, not by Memorandum of Association as most of them have been, but by Letters Patent issued pursuant to either a general or special Act of the Province.

That is, precisely, the kind of Company the Privy Council had before it in the *Bonanza Creek Case;* and it held that such a Company had, by virtue of its Letters Patent Charter, not the status of a Common Law Corporation; not the right to carry on in Ontario any business beyond the scope of its statutory powers; nor even the right to carry on, but merely the capacity to acquire *ab extra* the right to carry on, its statutorily-authorized business outside the constituting Province.

Beyond the capacity to acquire extra-Provincial rights the Letters Patent Charter has no effect upon, and makes no alteration in the status—the powers or rights, the objects or purposes, or the capacities—of the Company. It remains, as it was created, not a complete entity *sui juris* but an agglomerated entity of partnership interests, restricted, restrained, and limited by the creating statute in compliance with, and in subservience to, which the Letters Patent Charter itself is issued.

Lord Haldane made this clear enough in the words which I have already quoted in my first Article, that the Letters Patent could in no way over-ride, or run counter to, any provision of the creating Statute under which they were issued.

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This being established, I summarize my conclusions:—

1. With reference to Ontario and Manitoba.
   (*a*) That the amendment of their Companies Acts giving Companies created under them the general capacity of Common Law Corporations does not change the status of those Companies or transform them into Common Law Corporations or into anything analogous thereto.
   (*b*) That these Companies remain, as created, Statutory Companies—imperfect and incomplete entities; and entities only for defined purposes; and that the correlative powers and capacities, including the added general capacity of Common Law Corporations, are limited and restricted to those purposes.
   (*c*) That the statutorily-restricted powers of these Companies to alter, extend or vary their objects or purposes or business are in no way affected by the added general capacity of a Common Law Corporation.
   (*d*) That the case of *Edwards* v. *Blackmore* was decided on wrong principles and a misapprehension of the amendment of the Ontario Companies Act; and that Companies in Ontario and Manitoba remain Statutory Companies subject to their creating Act and to the principles of *ultra vires* as laid down in the case of *Ashbury* v. *Riche*.

2. With reference to Saskatchewan.
   (*a*) That the amendment of the Companies Act giving Companies created under general or special Acts of the Legislature the capacity of a natural person, and declaring the incorporation of such Companies by Memorandum of Association shall have the same effect as if they had been incorporated by Letters Patent under the Great Seal, does not affect the status, objects

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or powers of the Companies under the creating Statute.

(*b*) That the amendment does not make the Companies Common Law Corporations, or anything analogous thereto, but merely gives them the capacity which the *Bonanza Creek Case* decided Provincial Companies created by Statute but incorporated by Letters Patent, had of acquiring extra-Provincial rights of operating their Statutory business and Statutory powers.

(*c*) That Companies in Saskatchewan are still as completely as ever they were, subject to the doctrine or principle of *ultra vires* as laid down in *Ashbury* v. *Riche;* that the case of the *Bank of Commerce* v. *Cudmore* was wrongly decided; and that the Ontario decision in *Edwards* v. *Blackmore* being the interpretation of totally different legislation, is not even an analogous authority in Saskatchewan.

BRAM THOMPSON.

Regina, March, 1922.

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A DRAFT OF A PROPOSED CODE ON THE SUBJECT OF THE SALE OF LANDS.

By F. Heap, Barrister, Winnipeg, Man.

1. This Act may be cited as "The Sale of Land Act."

General Provisions.

2. In this Act unless the context or subject matter otherwise requires,

(*a*) The expression "Action" includes counter-claim and set-off.

(*b*) The expression "Plaintiff" includes a defendant counter-claiming.

(*c*) The expression "Land" includes any interest therein or fixtures or hay or other crop growing or timber (unless agreed to be cut immediately).

(*d*) A contract of sale of land means, unless otherwise stated or implied, a contract of sale of an estate in fee simple in possession. There may be a contract of sale between the owner of one interest or estate and the owner of another interest or estate in the same land.

(*e*) "Completion" means performance of the contract according to its terms by conveyance of the land and payment of the price.

(*f*) The expression "Specific Performance" means completion of a contract when ordered by a Court or sought by action.

(*g*) The expression "The Court" means the Court of King's Bench, and the expression "A Court order" means an order of that Court.

(*h*) The expression "Deposit" means a sum paid by the purchaser to the vendor as a guarantee of performance of the contract and intended to be forfeited in the event of default on his part and to go against the purchase price in the event of completion.

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(*i*) Time is deemed "of the essence of the contract" when absolute punctuality is required for performance of all acts stipulated thereby and the person entitled to performance is, upon default in respect thereof, absolutely and irrevocably entitled to the penalty or procedure prescribed by the contract or the general law for such default.

3. Any right, duty or liability which would arise under a contract of sale of land by this Act or implication of law may be negatived or varied by express written provision in the contract or (in case of an auction sale) the conditions leading thereto.

4. Whether money paid by the purchaser is a deposit or a part (*i.e.* an instalment) of the purchase price is a question of fact to be determined by the intention of the parties.

5. Time is of the essence of the contract when such is the expressed or implied intention of the parties. Such intention may be inferred from the nature or subject-matter of the contract or its surrounding circumstances, and may be so inferred notwithstanding any particular form of words to the contrary in the contract.

6. Unless a different intention appears, provisions as to time are not deemed to be of the essence of the contract. When time is not of such essence by the original contract, it may be made so by a subsequent written notice by either party to the other when that other is in default, fixing a reasonable time for performance of the acts required by the contract and threatening to then claim or enforce the penalty or procedure prescribed by the contract or the general law for such default.

7. Time ceases to be of such essence when the party entitled to the performance of the act extends the time for performing it or otherwise shows an intention to waive in general the essentiality of time in respect of such performance. But a mere extension of time for a particular act is not a waiver of the essentiality of the substituted time.

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8. Judgment for specific performance may be upon such terms or conditions as to damages, payment of price, conveyance of land and otherwise as to the Court may seem just.

9. All persons interested in the land in any way must be made parties to any action for specific performance.

10. Neither party to a contract of sale is entitled to judgment for specific performance if the contract is of a speculative nature or vague or uncertain in its terms, or if specific performance would involve great hardship or unfairness to an innocent vendor, or if the plaintiff has been guilty of laches. Any right conferred by this Act to such judgment shall be deemed subject to this provision.

11. The rules of common law, and equity, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, accident, mistake or other invalidating cause, shall continue to apply to contracts for the sale of land.

12. Capacity to buy and sell, except as herein otherwise stated and except as altered by some special statute, is regulated by the general law concerning capacity to contract and to transfer and acquire property.

(*a*) An alien can hold, buy and sell land in the same manner in all respects as a natural-born British subject.

(*b*) Corporations can hold, buy or sell land only if and as authorized by some other statute.

(*c*) Unincorporated persons cannot hold, buy or acquire land except as individuals.

(*d*) An executor can sell the land of the testator only if and as authorized by the terms of the will or some special statute or for the purpose of paying debts of the deceased.

(*e*) An administrator can sell land of his decedent unless an infant is interested as an heir-at-law, in which

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case he can sell only if and as authorized by some special statute.

(*f*) A mortgagee can sell only if and as authorized by the terms of the mortgage or by some special statute.

(*g*) An infant's contract to sell or buy land if clearly prejudicial to his interest is void: otherwise it is voidable by him on his coming of age or by his legal representatives if he dies under age. A contract voidable as aforesaid is valid unless repudiated by him within a reasonable time after attaining his majority or by his legal representatives within a reasonable time after his death.

13. A party is not allowed to rescind after unreasonable delay, nor after any act treating the contract as still subsisting, nor unless he is able to substantially restore the other party to his original position, nor if a third party has previously intervened and become entitled to rights in the matter.

14. What is a reasonable time is a question of fact.

The Land and Vendor's Title Thereto.

15. If the vendor has not sufficient title at the time of the contract the contract is not thereby void, but the buyer may by notice or action or defence to an action rescind on that ground notwithstanding and without observance of a provision in the contract for requisitions and objections as to title, and he is entitled to recover his deposit with interest and the expenses of investigating the title and the value of any improvements made by him (but no damages). For the purpose of enforcing such recovery he is entitled to a lien on the vendor's interest in the land and a sale by the Court to satisfy the same. The provisions of this paragraph do not apply in case of a mere defect of conveyance.

16. If however after acquiring knowledge of such defect of title the purchaser still treats the contract as subsisting, then if the vendor subsequently acquires

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title, the purchaser will not be entitled to rescind on the ground of such defect without first by notice allowing the vendor a reasonable time to show and prove a sufficient title. And if the purchaser, by retaining possession or making alterations or improvements or further payments on account of the price, shows an intention not to rescind on the ground of such defect, he thereby loses the right to rescind even though the defects of title are not cured,

17. A vendor's title is sufficient to warrant him entering into a contract of sale if (but not otherwise) he then has the whole, legal and equitable estate contracted to be sold or an equitable right to get such estate and discharges of any encumbrances before the time for completion.

18. Where there is a trivial defect in the quantity or quality of the land sold and the misrepresentation was innocently made, the vendor is entitled to specific performance with an abatement of the price for such defect.

19. Where there is a material defect in the quantity or quality of or in the vendor's title to the land sold, the vendor is not entitled to specific performance. In case of such defect in quantity or quality, the purchaser is entitled to a conveyance or whatever the vendor has with abatement of the price for such defect, if such defect is capable of pecuniary assessment, unless the Court considers that this would involve excessive hardship upon the vendor or unless the vendor rescinds on the ground of such defect pursuant to an express provision in the contract or (in the case of an auction sale) in the conditions leading thereto.

20. The vendor is not entitled to rescind, as in the last preceding paragraph, in case of wilful or reckless misrepresentation.

21. An encumbrance or outstanding interest or easement or other defective title is not a matter for compensation pursuant to such an express provision or otherwise and in such case the purchaser can

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neither compel nor be compelled to accept indemnity against such defect.

22. No compensation shall be allowed to the vendor in any case whatsoever nor to a purchaser in case (a) there is a substantial difference between the property sold and the property which the vendor has, or (b) the purchaser bought with knowledge of the defect.

23. Where land is sold by a person who is not the owner thereof, and who does not sell it under the authority or with the consent of the owner, or under any special or statutory power of sale or under the order of a Court of competent jurisdiction, the buyer acquires no better title to the land than the vendor had, unless the owner of the land is by his conduct precluded from denying the vendor's authority to sell.

24. When the vendor's title to the land is voidable but has not been avoided at the time of the sale, the purchaser acquires a good title to the land, provided he buys it in good faith and without notice of the defect in the vendor's title.

25. Non-disclosure of latent defects in the quality, state or condition of the land of such a nature that if known to the buyer they would, to the vendor's knowledge, have prevented the purchaser from entering into the contract, disentitle the vendor to specific performance; but otherwise mere non-disclosure (without any misrepresentation or active concealment) of defects of quality will not affect the contract and there is no implied guarantee that the land is suitable for any particular purpose.

26. Non-disclosure, by the vendor, of defects in the title (such as a tenancy or easement or a building restriction) disentitle the vendor to specific performance, and if coupled with any want of good faith entitles the purchaser to rescind, notwithstanding an express provision in the contract or (in the case of an auction sale) in the conditions leading thereto, that the sale is subject to existing tenancies and claims of tenancies and to easements affecting the land. But taxes

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and other things necessarily incidental to the tenure need not be disclosed.

27. Where the contract has been obtained by fraudulent misdescription of the land on the part of the vendor, the buyer is not debarred from rescission by a general provision in the contract for compensation in case of misdescription.

Formalities of the Contract.

28. Specific performance of a contract of sale of land shall not be ordered against any person unless he or his authorized agent has signed a written or printed or partly written and partly printed memorandum thereof showing the parties the land and the price and all the terms that have been expressed and agreed upon, if the absence of such memorandum is specifically pleaded; except where

(*a*) The plaintiff has been in possession as buyer with the defendant's consent or has made alterations or improvements in respect of the land unequivocally referable to some contract or sale; or

(*b*) The making of such memorandum was prevented by fraud on the defendant's part.

29. Damages cannot be recovered for breach of a contract for sale of land not evidenced by such a signed memorandum: if the absence of such memorandum is specifically pleaded.

30. A verbal agreement, contemporaneous with a contract for sale of land, for variation or amplification of its terms or for performance of some collateral condition thereof and a subsequent verbal alteration of a written memorandum of such a contract may be shown by a defendant, and the plaintiff will then not be entitled to specific performance except on condition of due fulfilment or observance of such verbal agreement or alteration.

31. Where an action on the contract is resisted on a plea of want of a written memorandum as aforesaid, the party so pleading shall thereby lose his right, if

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vendor, to retain, and, if purchaser, to recover the deposit and other purchase moneys paid.

32. In the case of a sale by auction:—

(*a*) Where land is put up for sale by auction in lots each lot is *prima facie* deemed to be the subject of a separate contract of sale.

(*b*) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid.

(*c*) Where a sale by auction is not notified to be subject to a right to bid on behalf of the vendor, it shall not be lawful for the vendor to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the vendor or any such person; any sale contravening this rule may be treated as fraudulent by the purchaser.

(*d*) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the vendor.

(*e*) Where a right to bid is expressly reserved, but not otherwise, the vendor, or any one person on his behalf, may bid at the auction.

(*f*) The auctioneer is deemed an authorized agent of both the vendor and the purchaser for the purpose of signing a memorandum as referred to in section 9 of this Act.

(*g*) If the auctioneer verbally alters the printed advertisement or particulars in reading out or announcing the same, the purchaser is not entitled to specific performance except on condition of effect being given to such alteration.

Effect Pending Completion.

33. As between vendor and buyer a specifically-enforceable contract of sale operates as an alienation of the vendor's beneficial interest in the land. From its date he becomes a trustee for the purchaser condi-

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tionally upon performance of the contract by the latter. But against third party the purchaser is not entitled to enforce his interest until he has obtained or become entitled to a conveyance or at least has paid the price in full.

34. Until the payment in full of the price, the vendor has the right to possession and all rents and profits with a lien on the property for the amount of the unpaid purchase money; but, if in possession, he must take reasonable care to prevent deterioration (not including insurance) and pay the current out-goings. In respect of the period after the time fixed for completion or (if none is fixed then) after the time when the vendor first shows and proves a good title, he must account to the purchaser for the rents and profits and is liable to occupation-rent, but is entitled to interest on the purchase money at the legal rate. Subject to this, from the date of the contract the property is at the risk of the purchaser as regards loss (for example, the risk through fire) or deterioration, and he is entitled to be credited with its value.

35. The purchaser in possession must not, until payment in full, do any act which tends to depreciate the vendor's lien for his money, *e.g.*, cutting timber or otherwise committing acts of waste, and may be restrained therefrom by injunction.

36. Either party may assign and transfer, to a third party, the benefit of the contract and the purchaser, his interest in the land, but an express condition denying or limiting this right is valid and binding. If the vendor attempts to alienate the land itself, by sale, mortgage, agreement or otherwise, to any third person, he may be restrained by injunction therefrom.

37. Where an alienee from the vendor, without notice of the prior contract, gets the legal estate or pays his purchase price in full, his title will prevail over the equitable interest of the original purchaser; and this applies in spite of any notice of the contract

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subsequently acquired by such alienee. If, however, such alienee has such notice before getting the legal estate or paying the price in full, he may be ordered, by the Court, to convey to the original purchaser subject to a lien for any portion of the price actually paid prior to such notice.

38. Where a vendor's only title is a specifically-enforceable agreement with a third party to buy the land, and the vendor is in default under said agreement, the purchaser shall have the same rights (including right to specific performance) against the third party as if he held an express assignment from his vendor of said agreement unless the first agreement prohibited assignment thereof either absolutely or except upon conditions which have not been fulfilled.

Completion or Performance.

39. Within a reasonable time after the contract, the vendor must, by showing a certificate of title or by furnishing an abstract and producing all necessary title-deeds and evidence (by official birth, death, marriage and other certificates, where possible, otherwise by written and sworn testimony) show and prove the whole, legal and equitable estate (from the Crown) in the land to be vested in him or in persons whose conveyance or concurrence he is entitled to compel.

40. The purchaser shall be deemed to have accepted the vendor's title if (a) he fails within a reasonable time after such showing of title to object thereto, or (b) he goes into possession and alters the condition of the land, or, (c) he pays the full price. But such acceptance of title shall not be deemed to extend to mere matters of conveyancing.

41. Within a reasonable time after the purchaser has accepted the title, the vendor shall deliver a good and sufficient deed in the form and with the covenants prescribed in the Short Forms of Indentures Act or a transfer in the form prescribed by the Real Property Act, accompanied with the certificate of title, and also

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deliver possession, and the purchaser must, concurrently therewith, pay the full purchase price.

42. At the time of completion the vendor shall furnish a municipal certificate showing all taxes to be paid to the end of the year previous to the sale and must, if required by the vendor, then have the title standing in his own name clear of all encumbrances, all necessary documents of title being registered at his own expense.

43. Registered memorials of discharged mortgages shall be sufficient evidence of the mortgages without the production of the mortgages themselves, unless and except so far as such memorials are proved to be inaccurate; and the vendor shall not be bound to produce the mortgages unless they appear to be in his possession or power.

44. In case of registered memorials twenty years old, of other instruments, if the memorials purport to be executed by the grantor, or in other cases, if possession has been consistent with the registered title, the memorials shall be sufficient evidence without the production of the instruments to which the memorials relate, except so far as such memorials are proved to be inaccurate; and the vendor shall not be bound to produce the original instruments unless they appear to be in his possession or power; and the memorials shall be presumed to contain all the material contents of the instruments to which they relate.

45. A vendor or purchaser of land, or their representatives respectively, at any time or times and from time to time, may apply in a summary way in Chambers to a Judge of the Court of King's Bench in Chambers in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract, not being a question affecting the existence or validity of the contract; and the Judge can make such order upon the application as seems to him just, and will order how and by whom all or any of the costs of and incidental to the application are to be paid.

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46. Where land subject to any encumbrance is sold by the Court of King's Bench or out or it, the said Court may, if it thinks fit, upon the application of either party to the said sale, direct or allow payment into Court of such amount as when invested in securities approved by the Court shall be considered by the Court sufficient to meet the encumbrance and all interest thereon and the contingency of further costs, expenses and interest.

(*a*) Thereupon the said Court may, if it thinks fit, and either after or without notice to the encumbrancer, as the Court thinks fit, declare the land to be free from the encumbrance, and may make any order for conveyance or vesting order upon giving effect to the sale and give directions for the retention and investment of the money in Court and for payment thereof to the person entitled to receive the same.

47. The purchaser cannot insist on the conveyance to him being executed in his presence or in that of his solicitor; but he is entitled, at his own cost, to have the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor. This rule applies to transfers of registered land.

48. A purchaser can require the conveyance to be executed by the vendor and other necessary parties in person where this is practicable. If the conveyance cannot be executed otherwise than by attorney, it must appear either that the power has not been revoked, or that it is valid in favour of the purchaser notwithstanding any matter which would operate to revoke it. The power of attorney must be filed in the proper Registry Office or Land Titles Office at the vendor's expense.

49. A contract is not invalidated by one or both of the parties subsequently being convicted of treason or felony or becoming lunatic or marrying.

50. Where the vendor and purchaser are citizens of different states or countries between which war breaks out before the completion of the contract, it is thereby avoided and each party is absolved from performance.

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51. Where either party to an Agreement for Sale is, before completion, judicially adjudged bankrupt, his trustee may by disclaimer abandon all his rights under the contract and avoid liability for completion.

52. If a judgment is duly registered against the vendor before completion, the purchaser shall pay the purchase moneys to the judgment creditor to the extent of the judgment.

Remedies for Purchaser's Default.

53. If the purchaser wrongfully fails, neglects or refuses to pay the price or any part thereof, or if his conduct amounts to repudiation of the contract, the vendor may, where he has not conveyed or rescinded, return the deposit and recover the damage he sustained by reason of such breach. The measure of such damage is sustained by reason of such breach. The measure of such damage is *prima facie* the difference (after deducting any deposit or other moneys paid by the purchaser) between the contract price and the value of the land at the time of the breach.

54. Upon such breach the vendor is entitled to specific performance subject to a discretion in the Court to award damages in lieu thereof, and the Court may, if it thinks fit, award damages in addition to specific performance.

55. Upon such breach, where the land has been conveyed, the vendor may recover all arrears of price as an ordinary debt.

56. Upon such breach he is also entitled to a Court order under his vendor's lien for sale of the land to satisfy all such arrears. Provided, that the taking of a mortgage for the price or part thereof disentitles the vendor to such order to the extent of such mortgage, but neither taking bills of exchange or judgment for the price nor letting the purchaser into possession nor conveying the land to him so disentitles the vendor. After such sale any deficiency still remaining is recoverable by action.

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57. Upon such breach, in lieu of the foregoing remedies, the vendor may, by notice, rescind the contract and retain all moneys paid, (a) where nothing has been paid but a deposit, or (b) where the conduct of the purchaser amounts to repudiation or abandonment of the contract, or (c) where the contract expressly authorizes such rescission. Any mode prescribed by the contract must be followed strictly in order to effect such rescission.

58. In case of rescission as provided in paragraph 57 (c) above, where more than a deposit has been paid, the Court may in its discretion, unless the vendor has resold or time is of the essence of the contract, relieve against the rescission and grant to the purchaser a specific performance upon condition of payment within a time or times appointed by the Court.

59. Upon breach as aforesaid in cases not provided for by paragraph 57 above, where more than a deposit has been paid, the vendor is by action entitled to an order fixing a time for payment of all arrears, and if the default still continues after such date, then to a subsequent order either for rescission of the contract or (in the Court's discretion) for sale of the land.

60. Where the contract is rescinded, whether by action or by notice as provided above in paragraph 57, the vendor is entitled to retain the deposit and any excess of price realized over the contract price, but not to recover any deficiency or damage or occupation rent, and he must refund all instalments received unless expressly authorized by the terms of the contract to retain them; and even in the case of such express terms, the Court notwithstanding that time is the essence of the contract, may in its discretion, unless the conduct of the purchaser amounts to repudiation or abandonment of the contract, direct return of such instalments to the purchaser, either with or without deduction as the Court thinks fit for damage sustained by the vendor by reason of the breach.

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PURCHASER'S (ADDITIONAL) REMEDIES.

61. Where the vendor either (a) is able to convey the land but wilfully and wrongfully fails, neglects and refuses to do so, or (b) if at the time of the contract he knew he had no title and no means of acquiring it, and the circumstances are such that his conduct was fraudulent, or (c) if he is unable to convey owing to his own fault, not having made reasonable efforts to perfect his title, then the purchaser is entitled to recover by action, as damages, the loss he has sustained, the measure whereof is *prima facie* the difference between the contract price and the value of the land.

62. In all other cases where the vendor is unable to convey (either at all or only with a breach of trust), the purchaser is entitled to recover by action his expenses of investigating the title and entering into the agreement, but nothing more.

63. After completion of the contract, except in cases of fraud, no damages or compensation, on account of errors therein or defects as to the quantity or quality of the land or the vendor's title, are recoverable by the purchaser even in case of his eviction, unless (a) such errors amount to a breach of some contract, warranty or covenant in the conveyance itself, or (b) such compensation is expressly provided for in the contract. Such provision is sufficient for such recovery though general in its terms, unless it is expressly restricted to errors pointed out before completion. Provided that the conveyance may be rectified by the court where, through mutual error, it fails to operate so as to carry out the real intention of the parties. And provided also that remedies in respect of a stipulation collateral to the contract are not terminated by completion of the main contract.

FRED. HEAP.

EDITOR'S NOTE.—The author has followed the unusual course of submitting this draft Code without gloss or comment; but in the assurance that it is a beneficial suggestion which will bear criticism by men conversant with the subject dealt with. That criticism is solicited by the author; and the CANADIAN LAW TIMES will do its part by giving it publicity. B. T.

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PURCHASE FOR VALUE AND ESTOPPEL.

By Henry W. Ballantine.*

(Continued from March Issue.)

VI. The Effect of Getting in Legal Title after Notice.

In *Dueber Watch Case Mfg. Co.* v. *Dougherty*,[124] one Coburn was given stock in the plaintiff company to qualify him as a director, which he agreed to transfer back to the corporation. While this stock stood in his name, he induced Dougherty and another to indorse his note under an agreement with them that he would subsequently transfer the stock to them as collateral security for his liability upon their indorsement. At the time of this agreement the indorsers had no notice of the right of the company to the stock, but they received notice of that right before Coburn assigned the stock to them. After this notice, Coburn made the assignment to the indorsers. It was assumed that both the company and the indorsers had equitable claims to the stock and the question was which should prevail. The court sustained the claim of the indorsers against the equity of the company to a re-transfer of the stock, partly on the ground of a superior equity by estoppel and partly on the ground that the indorsers had the right to protect their junior equity by getting in the legal title to the stock even after notice.

It was a sufficient ground of decision that "one who places the legal title to his property in the name of another, must take the hazard of any loss that may result from his dealing with it as his own, so far as innocent third parties are concerned. On principles

* Editor's Note.—This admirable article deals with Canadian, English and American Case Law on the subject discussed.—B.T.

[124] (1900), 62 Oh. St. 589, 596; 57 N. E. 455.

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of natural justice his equity is inferior to that of any person who acquires in good faith any title to the property." [125]

The second ground of decision is open to serious doubt and criticism. May the holder of a junior equity secure priority by clothing himself with legal title, though he does so after notice of the earlier equity and merely for the purpose of securing priority? There is not much positive authority on this question in the United States, but the better opinion is that he should not be able to do so.[126]

Under the English law, a junior equitable claimant may fortify himself by getting in the legal title after notice so long as he does not become a party to a breach of trust. If Coburn was a trustee for the company, the indorsers would seem to have participated in a breach of trust in the subsequent transfer. A transferee of a merely equitable interest takes, in general, only what his transferor can equitably give him. But in England he can subsequently "perfect" his title, even after notice of a prior equity or interest by acquiring the legal estate, except from a trustee.[127] Thus a third mortgagee of an equity of redemption who acquires the legal estate, after having knowledge of the existence of the second mortgage, will be entitled to squeeze out and gain priority over the second mortgagee. The reason assigned is that where the equities are equal, the legal title shall prevail, and he that has only an equitable claim or title shall not take a legal title from another with an equally meritorious equitable title. But it is assuming the whole case to say

[125] See 2 Pomeroy, Equity Jur., secs. 710, 727, 729, p. 1437; Scott, Cases on Trusts 669, note; 1 Machen, Corporations, sec. 882; Ames, Cases on Trusts 229, note; 30 Harv. L. Rev. 103.

[126] See 2 Pomeroy, Equity Jur., 4th ed., secs. 727, 729, 740, 755, 756, 768; 2 Tiffany, Real Property, 2nd ed., sec. 566, pp. 2174, 2175; *Wenz* v. *Pastene* (1911), 209 Mass. 359, 363; 95 N. E. 793; Ames, Lectures Legal History, 267, 268.

[127] *Jennings* v. *Jordan* (1881), L. R. 6 A. C. 698, 714; 51 L. J. Ch. 129; *Marsh* v. *Lee* (1671), 2 Vent. 337; 2 White & Tudor L. Cas., 8th ed., 121, 136, 185, 961; *Pilcher* v. *Rawlins* (1872), L. R. 7 Ch. 259; Jenks, The Legal Estate, 24 Law Quar. Rev. 147, 155.

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that the equities are equal. It would seem obvious justice that each mortgagee should be paid according to his priority. The second mortgagee, when he loaned his money, might know that the land was of sufficient value to pay the first mortgage and also his own. To permit him to be defeated of a just debt by a contrivance between the first mortgagee and the third, is, indeed, a judicial absurdity. This is known as the doctrine of the *tabula in naufragio*. On principle no advantage should be attainable by taking a conveyance with notice of a prior equitable right. The fact that this unreasonable doctrine has been followed in England for some centuries is no reason for its adoption by an American court.[128]

In *United States* v. *Detroit*,[129] Sanborn, J., says, by way of dictum:

"A court of equity will not interfere at the suit of the holder of a prior equitable title or claim to deprive an innocent purchaser for value of a junior equitable estate of equal strength of a legal title which he has subsequently bought or obtained after notice of the defect. It will not disarm a *bona fide* purchaser, or take from him the shield of any legal advantage."[130]

It is believed that this does not in general represent the American Law and that in the absence of estoppel, a purchaser is not protected from a prior equity if he receives notice of it at any time before the conveyance of the legal title is executed, even though

[128] *Jennings* v. *Jordan* (1881), L. R. 6 A. C. 698, 714; 51 L. J. Ch. 129; 2 Tiffany, Real Property, sec. 566, pp. 2174, 2175; *Paul* v. *McPherrin* (1910), 48 Colo. 522; 111 Pac. 59; 21 Ann. Cas. 460, note. This doctrine apparently is not confined in England to the tacking of mortgages, but applies in favour of all equitable owners or encumbrancers for value and without notice of prior equitable interests, who get in the legal estate from persons who commit no breach of trust in parting with it: *Bailey* v. *Barnes*, [1894] 1 Ch. 25; *Taylor* v. *Russell*, [1891] 1 Ch. 826; [1892] A C. 244; 2 Pomeroy, Equity, secs. 683, 691, 766. But see Willoughby, Legal Estate, 70, 71.

[129] (1904), 131 Fed. 668, 678.

[130] 2 Pomeroy, Equity Jur., sec. 766; *Lea* v. *Polk Co.* (1858), 21 How. (U.S.) 493; 16 L. Ed. 203; *Bailey* v. *Greenleaf* (1822), 7 Wheat. (U.S.) 46, 57; 5 L. Ed. 393; 21 C. J. 208; *Weston* v. *Dunlap* (1878), 50 Ia. 183; *Fidelity Mutual Life Ins. Co.* v. *Clark* (1906), 203 U. S. 64; 51 L. Ed. 91; 27 S. C. R. 19.

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he may have paid the purchase money before notice.[131] Ewart, in his work on estoppel,[132] in speaking of the scramble for legal estate in the English Law says, "It resembles the greasy pig which being in the general scramble seized by some lucky competitor, gains for its captor the prize," even though in seizing it his hands be not entirely clean. The maxim is *Ubi Pig, Ibi Priority.*

The weight of authority in this country is that the purchaser of lands, who gets notice before he receives a conveyance, takes subject to the claim of the holder of a prior equity, although he makes his contract and pays the purchase price in full before receiving notice.[133] Thus if land subject to mortgage were sold by contract to two purchasers, each having no notice of the other, the English rule would give priority to the second if he succeeds in getting the mortgagee to convey his legal title to him. But it would seem that nothing that the mortgagee may do should affect the legal result in any way.[134] The first purchaser has the equitable estate and the second has nothing, as the mortgagor had nothing to give him.

The question has arisen whether one who pays the agreed consideration without at the time taking a conveyance may be protected as against a prior unrecorded conveyance after notice. Is this analogous to the question of tacking? It would seem not, for although the subsequent purchaser acquires merely an equitable title or claim, the later equity should be held superior by reason of the recording acts.[135] Of

[131] See Ames, Cases on Equity, 2nd ed., 288, note; *Grimstone* v. *Carter* (1832), 3 Paige (N.Y.) 420, 436; 24 Am. Dec. 230; *Louisville, etc., R. Co.* v. *Boykin* (1884), 76 Ala. 560; 2 Pomeroy, Equity Jur., secs. 683, 691, 756; 21 Ann. Cas. 463 n.; *Wigg* v. *Wigg* (1739), 1 Atk. 382; Willoughby, Legal Estate, 29-87; Ames, Lectures Legal History, 267, 283.

[132] Ewart, Estoppel, chap. 18, pp. 251, 252.

[133] *Paul* v. *McPherrin* (1910), 48 Colo. 522; 111 Pac. 57; 21 Ann. Cas. 460, note.

[134] 2 Pomeroy, Equity Jur., sec. 756; Jenks, 24 Law Quar. Rev. 147, 152.

[135] See 2 Tiffany, Real Property, 2nd ed., sec. 574, p. 2256; *Paul* v. *McPherrin* (1910), 48 Colo. 522; 111 Pac. 57; 21 Ann. Cas. 460, note.

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course apart from recording acts the second buyer would prevail if he gets in the legal title from the vendor without notice of the prior contract. Where notice is received before the purchase price is actually paid the completion of the purchase is generally held a fraud upon the prior claimant.[136]

In *Newman* v. *Newman*,[137] a *cestui* who had mortgaged his equitable interest later assigned his interest as security to the trustee who gave value without notice of the mortgage. He advanced his money on the faith of a legal title which he already had. It was held that the trustee could not be charged with the prior mortgage, but took the beneficial interest free and clear. This was compared by the court to cases in which a second equitable incumbrancer without notice has got in the legal estate and thus protected himself. It was said that there is nothing to prevent a trustee from dealing with his own *cestui que trust*, and then taking advantage of the legal estate which he does not get in later but has already. The priority here should not however be put on the theory of tacking or on the magic potency of the legal title, but on the ground that the assignment of the *cestui* to the trustee is in effect the release of an obligation. The relation between *cestui* and trustee is primarily personal, like that of creditor and debtor, and the estate of the *cestui* in the *res* is derived through the specific enforcement of the obligation. The doctrine that trustees who have got a legal estate, or an estate of any kind, may deal with their *cestuis* and get a beneficial interest in the trust property, if they have no notice that there had been any prior assignment or incumbrance, may well be compared to cases of a debtor paying the creditor without notice of an assignment. The trustee owes his obligation primarily to the *cestui*, and may, accordingly, discharge his obligation to the *cestui*, or take a release from him, unless he has received notice of some transfer of the *cestui's* claim. In the absence of notice

[136] *Wenz* v. *Pastene* (1911), 209 Mass. 359, 362; 95 N. E. 793.
[137] (1885), L. R. 28 Ch. Div. 674.

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the *cestui,* as creditor, continues to have apparent ownership and power of releasing or collecting from his debtor.[138] So the trustee is safe in paying an assignee of the equitable interest, who obtained the assignment by fraud, if the trustee has no notice of the fraud.[139]

VI. Summary and Conclusion.

The fundamental principles and policy of divestiture of prior rights by purchase for value are essentially the same at law and in equity. The purchaser for value without notice must show how he acquired an equity and why it is superior to the title, legal or equitable, of the real owner. The true merit of the innocent purchaser as against a *cestui* or other equitable owner, would seem to consist, not in having acquired the legal title, but in his acting in reliance upon the apparent title. The basis does not lie in the idea that equity respects the legal title as in itself superior to the equitable title, or that the equitable right is merely one *in personam.* The purchaser who has parted with value on the faith of an apparently absolute title in the trustee has not merely an equal equity with the *cestui,* but a superior equity. The *cestui* has created the situation, or is accessory to an act, which exhibits the trustee to the world as complete owner of the *res,* by which he is armed with the means of dealing with the property as his own. The hidden owner is estopped from setting up his title as against an innocent victim. His conscience is charged. His secret equity is inferior to that of the "mis-reliant" purchaser.

The rule as to cutting off equities has been crystallized into an artificial and technical doctrine by courts which have not clearly analyzed the "obvious equity" and policy of it. These are found in a kind of estoppel

[138] *Jenkinson* v. *New York Finance Co.* (1911), 79 N. J. Eq. 247; 82 Atl. 36; 2 Pomeroy, Equity Jur., sec. 702.

[139] *Lovato* v. *Catron* (1915), 20 N. Mex. 168; 148 Pac. 490; L. R. A. 1915 E. 451; Scott's Cases on Trusts 729. See *Fidelity Mutual Life Ins. Co.* v. *Clark* (1906), 203 U. S. 64; 51 L. Ed. 91; 27 S. C. R. 19; 2 Pomeroy, Equity, sec. 702; Ames, Lectures Legal History 261.

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which generally exists, even if there is no inquiry in each particular case as to misreliance on ostensible ownership, and even though the guiding principles are not carried to their full, logical conclusion in cases where the consideration is wholly or partially executory, or where the legal title has not yet been got in. Some of the cases of *tabula in naufragio* might perhaps be justified as cases where the junior equity to which the legal title was added with notice was superior by reason of estoppel.

Where the owner voluntarily permits strong evidence of title, as possession of a duly endorsed document of title, or a non-negotiable obligation, to be in the hands of another, he should not be permitted to impeach the evidence by which, owing to his own neglect or misplaced confidence, he has enabled the holder to impose on others.

The rules protecting a *bona fide* purchaser of certificates of stock are largely based on estoppel, at least apart from statute. The "semi-negotiability" of stock certificates results from ostensible title by the possession of the customary evidence of title. By statute many documents of title are being advanced from the estoppel class to the negotiable class.

The cutting off of latent equities by the *bona fide* purchase of choses in action and non-negotiable securities usually turns on questions of estoppel by the apparent title with which the holder of the document is clothed. If there is no evidence of title, as in case of a parol assignment of a parol chose in action, it is doubtful whether there is any basis in justice or policy to cut off latent equities. But those who suffer the outward evidence of ownership in another to allure innocent purchasers to their prejudice are not entitled to assert their latent claims.

The divestiture of a valid title by a wrongful sale to a *bona fide* purchaser for value thus rests on considerations of justice as between the purchaser and the true owner, and also upon the policy of the law that in the case of all property which is the usual subject of

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commerce, the transfer of title be made as quick, as easy, and as reliable as possible, and that full faith and credit may be given to the customary evidences of title.

The "*bona fide* purchaser for value without notice" might well be asked to give up his cumbersome title for some more convenient and descriptive one, such as "fair evidence purchaser." The divested owner is a party to the transfer as a kind of undisclosed principal of a power conferred on the seller by his own act or acquiescence, in clothing him with the external indicia of title or authority. In some exceptional cases such as money, market overt and negotiable instruments, where a thief or finder can give title, the power is one conferred by law to facilitate ready transfer on the strength of possession.

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OUR LONDON LETTER.

The Poplar Board of Guardians is much in the public eye, and in co-operation with the Poplar Council seems bent on wrecking the system of London government and introducing advanced labour ideas. Mr. George Lansbury, the able editor of "The Daily Herald," directs the activities of both bodies. The "Herald," it will be remembered, was under suspicion of being subsidized by Moscow. Mr. Lansbury, however, has the gift of an able pen and makes out a strong case in theory for his aims. Unfortunately in practice they would mean chaos or revolution. The quarrel of the guardians with Whitehall on the one hand and the unemployed on the other over poor relief has little to interest lawyers, although the newspapers find plenty of matter in it. The Council, however, came within the arm of the courts, for a mandamus was issued against them and, on their refusal to obey it, they were committed for contempt. Their "martyrdom" and subsequent release raises several interesting legal problems.

As reported in the Canadian lay press, the labour majority on the Council, in order to force certain administrative reforms, refused to levy rates to meet the expenditure of the London County Council. The latter body obtained a mandamus which the divisional court directed to issue against the borough council and the individual members thereof. The Court of Appeal, however, decided that mandamus could only issue against the individual councillors. Of these, twenty-nine refused to pay any attention to the order, and writs of attachment were issued against them. They went exultantly to gaol and seem determined still to maintain their refusal to levy rates. Indeed, if they did levy the rates, it is probable that the ratepayers of the borough would refuse to pay. The mandamus was granted because none of the other remedies were adequate and mandamus has proved even less effective.

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A flouted court, faced with persistent refusal to obey its solemn and peremptory order, released the offenders, who clearly had not purged their contempt. The ground of release was one of policy—that the offenders might take part in a conference to consider remedies for the situation which induced the councillors to defy the court. Their release is an unqualified triumph for the councillors, but is disturbing to the believers in what Professor Dicey calls the rule of law. It is a serious matter that the power of the court to act *in personam* should have lost its terrifying force. The whole elaborate system of Chancery Law was built on this foundation. Lawyers were generally surprised at the release, for it did not figure in their speculations on the legal niceties.

At first the Home Secretary was petitioned by various labour bodies to release the prisoners, but it is at least doubtful whether he has such power. The prisoners, it was argued, were not ordinary prisoners committed for a past offence for a definite term. If they were, the King, acting through the Home Secretary, could at once grant a full pardon. Until they levied the rates as ordered, they were in continuing contempt and the Crown has no power to pardon until after conviction. The dispensing power — the very existence of which at any time has been denied by eminent historians — finally went with the Bill of Rights. The problem, however, seems never before to have arisen in connection with a penalty imposed by the Court in order to enforce its own decree, and an attempt to release the councillors by executive order would have raised some very nice legal questions. As in *The Sheriff of Middlesex's Case* (11 Ad. & E. 273), Parliament and the courts found a practical way of dealing with contempt of Parliament, the executive can probably always be trusted on analogous principles, to leave the courts in such cases as the present to deal with those in contempt without interference. This seemed to be appreciated by the Home Secretary,

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and even the partisans of the prisoners came to realize that the Government could not intervene. The suggestion has been made that in any event the councillors would have been automatically entitled to release when their term of office expired on the analogy that persons committed by the Speaker for contempt of the House of Commons are entitled to release on the dissolution of Parliament. That rule, however, rests on quite different grounds. By the dissolution of Parliament the committing House of Commons ceases to exist. A dissolution does not release a person committed by the House of Lords and hence the peers specify a definite term of imprisonment. It was generally thought that it would, however, undoubtedly be easier for the Poplar councillors to secure release when their term of office had expired. Until then their contempt could not well be purged while they persisted in refusing to levy the rates, but when no longer in office an apology to the Court would have fully met the case. In civilized countries the courts seldom have their ultimate means of enforcing their judgments challenged, and when such a challenge is openly given it is surprising that the Court should take a course which makes its solemn mandamus a *brutum fulmen* "full of sound and fury, signifying nothing." Consequently many thought that even if the London County Council and Metropolitan Asylums Board, at whose instance the mandamus issued, should agree, as in fact they did, not to oppose an application for release, the court could not well grant such an application, when to do so would in effect be, if the contempt were not purged, the withdrawal of an order which had been deliberately flouted. While the councillors remained obdurate, therefore, death or statute seemed their only hope of release.

The Court, however, by accepting a respectfully worded request for release in lieu of obedience has displayed in the circumstances, which are undoubtedly perplexing, a sound common sense, which fortunately, in British law as in British statesmanship, habitually triumphs over false pride and "judicial niceties."

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For the legislator, the incident has even more interest than for the lawyers. This defiance of the courts is the culmination of a steadily growing tendency deliberately to disobey those laws of which one does not approve. The rule of the majority which until a few years ago passed as democracy, though, as Sir John Simon so clearly pointed out in his address to the Canadian Club in Toronto last summer, it is no such thing—if often felt to be tyranny. The sincere and deeply religious persons who set the fashion of passive resistance little thought that they were starting a tendency which may well shake organized society to its foundations. Leaving aside the military suffragettes and advocates of violence, we have seen conscientious objectors and hunger striking prisoners, although hopelessly in the minority, seriously embarrass all government; and the more it is realised that society is to-day so complex that a mere handful of people, by deliberately setting themselves to disobey the law, can throw the social machine out of gear, the greater grows the evil. Some solution of what, in an atmosphere not wholly free from revolutionary sentiment, undoubtedly constitutes a menace to government may be found in proportionate representation, or in a reaction against the feverish activity which under the dominance of Bentham's ideas has characterised Parliament for a century. In future bills which find their way to the statute book may be measures agreed upon by all interests affected who by refusal to obey the law could render it abortive, and so represent not the triumph of a domineering majority but a true general will.

The president of the Law Society in an address recently expressed a very decided opinion on the merits of the fusion of the two branches of the legal profession. The president declared that he had no hesitation in stating that there was no public or professional demand to justify legislation, and on the merits of the question he was of opinion that for England fusion was undesirable. Weight is lent to his

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opinion from the fact that some years ago he exhaustively examined the subject in order to make a report to a foreign government.

In the present year work in the King's Bench Division promises to be as congested as ever, and the divorce list is again filling up after the heroic efforts made to reduce it throughout last year. There are, however, less than half the number of causes that were in the list last year, though the reduction is very largely in undefended cases. The majority of suits are brought by husbands, and the proportion of husbands suing becomes still greater when it is realised that in many cases a wife's suit appears twice in the list. To secure a divorce in England, a husband need only prove uncondoned adultery which has not been encouraged by his neglect. A wife, however, must prove in addition either cruelty or desertion and in the ordinary sense of these terms it is in a great many cases impossible for her to do so. The courts, however, treat a refusal to obey an order for restitution of conjugal rights as equivalent to desertion. Consequently many women seeking divorce bring first an action for restitution, and having obtained an order, launch their divorce action. The discrimination between the sexes in divorce is of course much criticised and in view of the recommendations of a commission which recently reported on the whole subject of divorce is unlikely to survive much longer.

Before the long vacation the rumour was rife that two distinguished judges, finding the burden of taxation too great for their judicial income, intended to resume practice at the Bar, where they had sacrificed very substantial incomes on going to the Bench. The rumour, however, seems to be without foundation.

(Signed) FRANK GAHAN.

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NOTABLE CASES NOTATED.

Sale of Goods—Repudiation Rights—S. G. A. 1893.

Taylor v. *Oakes*[1] is an interesting question on the right of a buyer of goods to repudiate future deliveries simply on the ground that deliveries already made under the contract were defective or inferior in quality.

The case arose out of a Contract for the Sale of Furs. They were to be delivered at various times. The buyers received one or two consignments and accepted them. Then they resold, and after some time the sub-buyers made some complaint not of a very substantial character (the real cause of complaint was that the commodity had owing to purely market conditions fallen in price). Thereupon the original buyer notified the original seller that he would not accept any further deliveries, giving as the reason that the sub-buyer had made some complaint on the score of quality.

The seller did not ship any more fur, but sued for damages for breach of contract by repudiation.

Greer, J., held that technically there was a failure to deliver the fur according to Contract; that is that the two consignments made by Plaintiff and accepted by Defendant were inferior to such an extent as would have justified repudiation if that course had been adopted by the buyer when the fur came to hand. But that course was not adopted. The buyer accepted the fur and actually resold it, and had sustained no, or very little, loss. His only claim would be one for breach of warranty. This was severable. There remained the right to repudiate the rest of the goods, and the Judge held that a divergence in quality in the first consignment did not mean that the future consignments would be also inferior. The principle of *non constat* applied; and he held there was no right to repudiate the goods except as they came forward.

[1] 38 T. L. R. 349.

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An interesting question developed. It was this: that practically the Plaintiff admitted that the goods already sent would have justified repudiation and that the future consignments would have been in the same position, so that one by one they could have been repudiated; but following the authority of *Braithwaite* v. *Foreign Hardware Company*,[2] this fact or state of facts, even if proved conclusively, could form no defence to the claim of the Plaintiff founded on an act of repudiation made before there was any breach *quoad* the goods repudiated. The first part of the fur, be it remembered, had been accepted; and the remainder was repudiated upon an hypothesis which the law did not sanction. In other words *ab uno omnes discere* does not apply to a condition of affairs like this.

Sale of Going Concern—Buyer's Liability for Losses.

Golden Bread Company v. *Hemmings*,[3] lays down a principle of great importance in Commercial Law, namely, that when a business has been sold as a Going Concern and a day has been specified in the Conditions of Sale for completion, after that day the Vendor is a Trustee for the Purchaser, and if there are losses the Purchaser has to bear them. But this would appear to be dependent upon the Purchaser being notified by the Vendor or being otherwise apprised that the business would be carried on and that there might or would be possible loss. It would then be the Buyer's duty to elect to have the business carried on or to say to the Vendor he wanted it closed down. Good-will is something which might be of great value quite independent of the fact whether, for a time, the business was or was not a paying concern.

It seems strange that there was no specific authority for such an ordinary condition of affairs as arose in the case. The day for completion was fixed and it was reasonable; the business was a bakery and its cessation, for even a day, would impair the good-will

[2] (1905), 2 K. B. 543.
[3] (1922), 1 Ch. P. 163.

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value. The delay in completing was attributable to the buyer, and he was notified that while the business was being carried on by the Vendor, if there was any loss it would be charged against the Purchaser.

The general principle of the relationship between Vendor and Purchaser after the date specified for completion is laid down by Lord Cairns in *Shaw* v. *Foster*[4] —"the Vendor was a trustee of the property for the Purchaser; the Purchaser was the real beneficial owner in the eye of a Court of Equity." The case of *Dakin* v. *White*[5] was cited as an authority to the contrary; but the Court distinguished it on the ground that the delay in completing in that case was the delay of the Vendor; and moreover the Purchaser had not been notified or put to his election whether he wished the business carried on or not, and if he did wish it carried on that he knew he would be chargeable with any loss after the specified day for completion.

What is apparent possession?

In re *French* v. *Gettings*,[6] a very important question arose as to what is apparent possession under the Bills of Sale Act 1878. Most of the Provinces of Canada have enactments identical or corresponding with this Act, or at least with section 8 of it, that "Every Bill of Sale shall be registered within 7 days . . . otherwise . . . as against Sheriff's Officers and others . . . such Bill of Sale . . shall be deemed fraudulent and void as regards the property in or right to possession of any chattels comprised in such Bills of Sale which, after the expiration of such seven days, are in the possession or apparent possession of the person making such Bill of Sale." Section 4 defines apparent possession thus: "Chattels shall be deemed to be in the apparent possession of the person making or giving a Bill of Sale so long as they remain in or upon any house . . . or other premises occupied by him . . .

[4] (1872), L. R. 5 H. L. 321.
[5] (1872), 2 Russ. 170.
[6] (1922) 1 K. B. 236.

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notwithstanding the formal possession thereof may have been taken by or given to any other person."

The household goods in this case had been assigned by husband to wife by a Deed which had not been registered as a Bill of Sale, but there was no dispute that she had been given possession of them so far as that could be accomplished. The Sheriff under an execution against the husband claimed the right to seize the goods The wife claimed them and an interpleader followed. The Court held that goods in a "conjugal domicile" were not in the "apparent possession" of the husband. The premises were not occupied by him but by him and his wife and family. The decision was based on *Ramsay* v. *Margot*,[7] and applying this to the present case, Bankes, L.J., said: "The absolute property of the wife is the basis of *Ramsay* v. *Margot*. It is immaterial to consider how the goods became her property . . . where the husband and wife are living together in the conjugal domicile there is no presumption that the household goods are in the apparent possession of the husband." Following also *Jones* v. *Chapman*,[8] he held that possession follows the title; and that when the wife bought the goods from her husband and paid for them they became her property.

Divorce—Adultery with Intervener.

Rutherford v. *Rutherford*[9] is an important case in the Provinces administering Divorce Law, especially those which have the Matrimonial Causes Act 1857 and its amendments. It was an action by a wife and only one act of adultery was alleged. It was held to be proved and the Nisi Order was made; but the lady with whom the husband was alleged to have committed the adultery intervened by leave of the Court, and proved to the satisfaction of the Court she had not committed the adultery. Under these circumstances what was the Court to do?

[7] (1894), 2 Q. B. 18.
[8] (1847), 2 Ex. 803, 821.
[9] 38 T. L. R. 353.

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Well it had to get down to common sense and dismiss the Petition.

It is one of those cases which show how dangerous it is to rely on one individual act. There seemed to be little doubt in the mind of the Court that adultery had many a time been committed between the husband and the intervener; but the intervener proved that on the only one occasion alleged no act of adultery had taken place.

Meaning of Shipment in Contracts for Overland Carriage.

The word shipment has come by general acceptance in this country to mean either putting goods on a Railway car for carriage overland or on a ship for carriage over sea. Like most of the other makeshift slipshoddery it has landed somebody in law.

The case of *Mowbray* v. *Rosser*[10] arises out of a Contract made in England between a buyer there and an Agent there for a firm trading in the United States to sell certain Timber, and to "ship" it before a certain date to the buyer in England. It was a C.I.F. Contract and payment was to be made on delivery of shipping documents. The shipment was to be via New Orleans and the date was of the essence of the Contract.

The Defendants refused the Timber on the ground that it was not shipped according to Contract, and the Plaintiffs contended, and, I think, proved that it had been duly shipped in the sense in which that word is understood in America, namely, by loading it into Railway cars, on or before the date stipulated in the Contract.

Evidence on the trial was given of the meaning which customary usage had given to the word shipment; and the trial judge gave effect to it and rendered judgment for the Plaintiff.

The Court of Appeal unanimously reversed this, relying upon *The Turid*,[11] which decided that where

[10] 38 T. L. R. 413.
[11] 37 T. L. R., p. 300.

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the custom of a Port was inconsistent with the express words of a Contract or Charter-party, it could not be read in so as to displace or controvert the plain and natural meaning of the words in the Charter-party. This case went to the House of Lords, and this Judgment of the Court of Appeal has been affirmed. At writing the Report has not come to hand, so we cannot give the reference.

The Master of the Rolls in *Mowbray* v. *Rosser* said the Contract was between two English-speaking people.

In fact it was made by two Englishmen, although the Timber was to go from the U.S. There could be no ambiguity about the word "shipment" in such a Contract. Custom cannot over-ride the express words of a contract though custom might explain some latent meaning or ambiguity.

Gaming Debts—Recoverability.

Cohen v. *Hall*[12] is a case on gaming in which an exceedingly ingenious defence was raised in an action for the recovery of a sum of money paid by cheque in respect of a lost wager.

The Gaming Act 1835, section 2, states that money paid in the way stated by cheque "shall be deemed and taken to be a 'debt' due and owing from the recipient" to the person who shall have paid such money, and shall be recoverable in an action. To make a "debt" there must be a promise express or implied to pay. The 8 & 9 Vic. c. 109, enacts that all contracts or agreements whether by parol or in writing, by way of gaming or wagering, shall be null and void, and 55 & 56 Vic. c. 9, provides that any promise express or implied to pay any person any sum of money paid by him under any contract or agreement rendered void by 8 & 9 Vic. c. 109, shall be null and void, and no action shall be brought in respect thereof.

Here the bet was lost, the money was paid by the loser by a cheque, and then an action brought to recover it back under the old Gaming Act 1835.

[12] 38 T. L. R. pp. 150, 429.

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Money has frequently been recovered in this way and there is practically no defence—except the proof of the payment and that it was for a lost wager. But ingenuity raised this new question: That the old Gaming Act of 1835 which made the money recoverable as a "debt" was impliedly repealed by the Act of 1892, which declares all promises, express or implied, to pay money under a wagering contract to be null and void. A "debt" is dependent on a promise, express or implied, and such a promise for a wagering debt or money recoverable as such is "void" by the Act of 8 & 9 Vic. as well as the Act of 1892. How could it be recovered?

The Court of Appeal have just held that there is no antagonism between the later and the earlier Act, and that the "debt" which is created by the Gaming Act between a payor and receiver of money under a wagering contract is a Statutory debt and requires no promise express or implied. It is made a Statutory obligation to repay it and requires no promise express or implied to recover it.

Contributory Negligence.

A very interesting question on contributory negligence arose in *Mercer* v. *S. E. Railway Co.*[18] It was an accident that occurred at a level crossing. There was a wicket-gate which was customarily locked when a train was passing. The Plaintiff had many a time before to wait outside the wicket-gate while the train passed. On the occasion of the accident he and some companions approached and went through the wicket-gate and instantly he was struck and injured by a passing train.

Was the open gate an "invitation" to pass through, and could he by ordinary care and diligence have seen the train and averted the accident? If it had been a case of a train coming along which he would have seen by using his eyes he could not avail himself of the "invitation" to pass presented by the open gate to make the Railway responsible for his own folly. But

[18] 38 T. L. R. 431.

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in this case it seems there were two trains, one up and one down, passing at the same time, and while he could see the up train he could not see the down train, and it was the down train which caused the injury.

Therefore there was no "negligence" attributable to him at all. *Indermaur* v. *Dames*[14] followed.

On this subject I strongly recommend to Lawyers particularly interested, that they should read an Article in the Law Quarterly Review for January by the Right Hon. Lord Justice O'Connor (one of the Irish Appeal Justices).

Incidence of Succession Duty on Intra and Extra Provincial Property.

Royal Trust Co. v. *Finance Minister of B.C.*[15] This is a termination of a piece of long-drawn-out litigation, preceded however by long-drawn-out extortionate exactions on the part of all the Provinces of Canada under their Succession Duty Acts. This particular case arose in B. C., but the enactments are nearly the same in every Province of Canada on the imposition of Succession Duty in cases where, as often necessarily happens, a deceased owned property not only in the Province of his domicile but in other Provinces as well.

In this case Sir William Van Horne was domiciled in Quebec and left an estate of upwards of $6,000,000. Property to the extent of $300,000 of this was in B.C. The Succession Act in B.C. imposed a Scale Duty on the "net value" of a deceased's estate; so much for the first $100,000; so much for the second and so on. This duty was imposed by Section 7 on "all property situate within the Province;" and "net value" was defined to be "the value of the property both within and without the Province after the debts, etc., are deducted."

The Minister of Finance in B.C. assessed the Succession Duty payable with respect to the $300,000 in B.C. in this way:—He took the gross "net value" of the estate as stated, inside and outside B.C., and divid-

[14] L. R. 1 C. P. 274; 2 C. P. 311.
[15] (1922), A. C. 87.

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ing this by the admitted value of the estate in B.C. he got a relative quotient of 21.34. Then on the whole "net value" he ascertained that on the first $100,000, $4,683 was payable. This he divided by 21.34, the relative amount in B.C. and carried out the result of $70.34 as the Succession Duty on the first $100,000 in B.C. He carried out the same reckoning with the next $100,000; and so on, and got in this way a total assessment of $14,242.

The Executor of the deceased contended that there was nothing in the Act itself to justify this rateable assessment of duty, and that when the basis of the estate was ascertained according to the definition of "net value," that is the value of all the property of deceased wherever situate, then the tax could only be imposed directly on the part actually in B.C., and not by way of any proportionate assessment relative to the whole. The Executor in this way admitted the $300,000 in B.C. to be liable to a Succession Duty of some $8,523. Mr. Justice Hunter in B.C., affirmed this contention of the Executor and the Court of Appeal in B.C. by three to two upheld him; then the Supreme Court of Canada by three to two reversed the B.C. Court of Appeal; and now the Privy Council has restored the decision of Mr. Justice Hunter and of the majority of the B.C. Court of Appeal.

The case admits of one reflection. How the tremendous diversity of opinion on a proposition so clear and unmistakable could have generated? It is almost incomprehensible. As Lord Cave said in the Privy Council: to place the construction on the Act that the Minister of Finance contended for, it would have been necessary to read into the statute words which are not there—in other words "make" and not "construe" a statute.

I will go further myself and say if they were there they would be *ultra vires*.

I remember having the proposition placed before me some three years ago; and it gave me no difficulty then to arriving at the conclusion now embodied in the Privy Council decision.

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BOOK REVIEWS.

Canadian Companies and the Judicial Committee. By Edward Robert Cameron, K.C. Toronto: The Carswell Company, Limited.

The Profession of the Law throughout Canada is indebted to Mr. E. R. Cameron, K.C., for many splendid contributions to Legal Literature, particularly on the Canadian Constitution, and on Corporation Law.

The present volume is a worthy addition to the great monument which his writings on diverse subjects are surely raising.

The work now before us is a companion or supplement to Mr. Cameron's Book published in 1917, dealing with the Appeals to the Privy Council in the matter of the *Insurance Reference,* 1916, A. C. 588; the *Bonanza Creek Case,* 1916, A. C. 516; the *Companies Reference,* 1916, A. C. 598; and the *John Deere Plow Company's Case,* 1915, A. C. 330. The present volume deals with the consolidated Appeal to the Privy Council in the *Great West Saddlery Case* (1921), 2 A. C. 71.

The Book is valuable for the fact that it sets out the argument *in extenso* before the Privy Council, just as was done in the former Book; and to say that this is illuminative is to yield it only a small meed of recognition for the advantages accruing to the reader.

But the Book transcends this great feature in the review presented by the author himself of the Privy Council decisions on Canadian Company Law, including a discussion and analysis of the earlier cases. This review covers (1) Provincial Companies and (2) Dominion Companies under 5 different aspects. One of these is Provincial Legislation affecting Dominion Companies; also Dominion Legislation affecting Provincial Companies. Another is Discrimination against Dominion Companies in Provincial taxation.

These are masterful expositions. But Mr. Cameron does not stop there. He turns his great mastery of the subject to practical account by setting out the amend-

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ments which he suggests to the Companies Acts of the various Provinces for the purpose of meeting the position of the Provinces in relation to Dominion Companies as it has been expressed in the various Privy Council decisions.

No single man, we should say, is in so fit a position for this great work as is Mr. Cameron, whose every word reflects a thorough comprehension of every difficulty presented in the various cases reviewed by him, together with the acumen of the skilled lawyer to meet them in such a way that future litigation may be averted.

The Bar of every Province of Canada is under a deep obligation to Mr. Cameron for this magnificent work; and we trust that side by side with the previous volume, of which it is the complement, it will promptly find a place in every Law Library and on the shelf of every Lawyer's private Library throughout the Dominion of Canada.

It is a unique and superb work from the practical no less than from the philosophical standpoint.

I may add as showing the wealth in value of the verbatim argument to the real Student of Law, that there is a marvellous exposition at pages 155-6 of the rights of the Western Provinces to their Land quite independent of any enactment of the Dominion Parliament. The land adhered to them under the B. N. A. Act, *ipso facto,* on the carving out of them from the larger area already subject to the Act.

How often we have heralded this as a voice from the wilderness without a Canadian response! And now the full echo returns from the Halls of Westminster! B. T.

Problems of Peace and War, being Papers read before the Grotius Society in 1921. London: Sweet & Maxwell, Limited. Toronto: The Carswell Company, Limited.

This is Volume VII. of the Transactions of the Grotius Society and contains an unique array of papers on the problems of Peace and War.

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The Grotius Society was founded in 1915 in the interest of the study, development and elucidation of International Law, and certainly it has gathered around it, or rather within it, men of real eminence and worth in this long-neglected field of human endeavour.

Grotius, who is regarded as the Father of International Law as it is understood to-day, was born in 1583. He was in fact one of that marvellous human constellation which was coincident with the emergence not only of Britain but of Europe into the dawn of intellectualism which still is luminous, though now and then somewhat obscured by the grim shadows of war, pestilence and famine which flit across the horizon. In that constellation were Shakespeare, Bacon, Milton, Lipsius, Scaliger and Casaubon, Junius, etcetera.

Grotius was a genius and was the son of a man very much akin to genius if he was not actually possessed of the sacred fire. Like many another great jurist, he evinced strong tendencies for Poetry, and wrote charming odes and sonnets in Greek and Latin. Yet he developed into the World's first and greatest exponent of International Law.

Let our Canadian friends in the Law who rather contemn the literary talent take cognizance of this fact, and learn.

In this volume there is a beautiful sketch of Grotius himself by W. S. M. Knight, and papers on Aerial Warfare and the Laws of War; the Right of Belligerent Merchantmen to Attack; Justiciable Disputes; the Washington Conference and other subjects. Each paper is contributed by a man expert in the subject on which he treats.

To every man who wishes to keep abreast with the World's great problems and cognizant of their constantly changing complexions and complexities, we strongly commend the reading of these Publications of the Grotius Society as they appear. This Volume VII. is one of the best we have seen—full of interest, great knowledge, and vitalizing ideals of the World and her affairs.

B. T.

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The
Canadian Law Times.

VOL. XLII. TORONTO, MAY, 1922. No. 5

EDITORIAL.

Canadian Bar Association.

The Annual Meeting of the Canadian Bar Association takes place this year at the Pacific side of the Dominion—at Vancouver on the 16th and 17th, and probably at Victoria on the 18th of August. It is an important coincidence that the American Bar Association also meets this year on the Pacific Seaboard—at San Francisco on the 9th, 10th and 11th of August.

These are two great events in the life of the Bars of the two adjoining Nations; and the proximity of their places of meeting as well as the nicely adjusted sequence of time, should induce and effect reciprocal attendances at the meeting of each other. It is an ideal arrangement. It gives an ideal opportunity; and we are hopeful of ideal results.

To know one another better will engender a higher mutual esteem.

The Canadian Bar Association has often been honoured with the attendance at its meetings of some of the conspicuous jurists of the United States; and our neighbour's hospitality has even more often been extended to distinguished Members of the Canadian Bar. How frequently both of them have greeted the illustrious representatives of the English, Irish and Scotch Bars, and how cordial has been the spontaneous acknowledgment of all of them to the common source or origin of their jurisprudence! The Englishman, Irishman and American can sing in chorus over their

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Common Law, while the Scotchman joins the refrain which ascribes the glories of our Equity to the transmuted conceptions of Roman Law absorbed in its purity by his Country and developed as her own indigenous growth.

Here at least is one shrine where the English-speaking Jurists can all meet and bow in reverence together. Here too is a bond, if not of union, at least of sympathy in achieving a common objective in the World's civilization and progress even though it be followed by divergent paths and at varying distances. Our Law, like our Religion, has a Common source; and despite the obscuring froths of controversy our psychology in relation to the World and our place in it is identical in its radical essentials. Let us preserve it thus, and transmit it on to those who succeed us.

The most cohesive of all the forces of Nationhood or Empire is the Law, civil as well as criminal. Without it all falls into chaos. The first sign of disintegration always has been, and always will be, disrespect followed by contempt and next by defiance of the established Law. When the revolutionary wave, at any time in history, has exhausted itself, the rehabilitation of the Majesty of the Law is the first herald of Civil Order. Law is Majesty whether it be, and so long as it is, represented by a Sovereign King, a Sovereign People or a Sovereign Parliament. The phrases are dialectical and do not signify a difference. But once Law loses its Majesty it passes to the canaille who trample it underfoot, and then instant disintegration undermines the State. We have seen it in Russia and elsewhere.

The upholding of the law is the forte of the Lawyer and presumably we suppose that is why so often he is regarded as non-progressive. It is a mistaken notion. He advances deliberately and on sure footing so that he has seldom to go back to where he began; and in the end he is in this way ahead of the man who makes a rapid plunge and then finds he cannot reach the goal which turns out to be merely a mirage receding as he advances towards it.

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The lawyer has been the architect of all our great Constitutions. His place in the World has been a noble one; and let us in this day be the maintainers of its great prestige. We cannot do so by dwindling from the high standards set up by our predecessors in law, and learning, and general culture.

The aroma of emulous ambitions after excellence in these matters is infectious. It permeates everything it touches, and generates great activities.

By meeting together we inhale and radiate it; and so we look forward to the greatest of all annual meetings of the Canadian Bar Association in August next.

There is a great array of highly important matters to come forward—Life Insurance; Property Rights of Married Women; Estate Devolution; Conditional Sales; Workmen's Compensation and Company Law. These largely relate to the scheme of Uniformity; and they will afford ample material for discussion at the Conference of the Commissioners representing the various Provinces which takes place four days before the Annual Meeting.

The great connecting link of Canadian Lawyers between the periods of these Annual Meetings ought to be a Legal Journal or Law Magazine. We have done what we could to make the CANADIAN LAW TIMES serve the purpose by discussing questions affecting every Province of Canada, and we have availed ourselves of every contribution that affected Law or Lawyers in any part of the Dominion. Grateful acknowledgments have come to us from the East and the West; and in return all we can say is what the writer said when he undertook the Editorship over two years ago:—"The C. L. T. is, or ought to be, the organ of the Lawyer for expounding Law, for suggesting reforms, and for correcting errors and misconceptions." And all we regret is that it has not been more extensively utilized, though there are now many indications of an awakening ambition among the younger aspirants to forensic fame to display their personality in the garniture of written contributions on some of the manifold subjects which

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concern the legal mind—problems practical, theoretical, and reformatively constructive.

B.T.

Our Judges: Whence Come They?

It is not because recent appointments to the Supreme Courts of the various Provinces have followed the practice of both political parties, and have been made to political followers of the Government in power, that we take exception to some of them at all events. Our objection is that some of the appointees are not men who have distinguished themselves in anything but the political arena. Some of them are merely ignorable cyphers in the legal profession, and the Government was not justified in appointing them to the Bench of our Country. We do not reflect professional jealousy when we say the appointments are a betrayal of the public in the worst form. The law is the heritage and right of the people. Long training and study are necessary to master its essential justice; and its dispenser from the Bench ought to be a man of high legal attainment, of distinction in his profession, and of unsullied probity. How otherwise are the people to get justice?

The task of the Judge in Canada is intensified by the make-shift, cobbled-up legislation which is rushed out in quantities with machine speed unto our Statute Books year by year. It is too frequently drawn up by men who either do not know what they want or else are unable to express that want in comprehensible language. Or in many cases when it is well drawn to express the want, it is defaced in the Legislature by the pertinaceous nibbler who manages to change something which throws everything else into confusion.

The Judge has to be a master-exponent of the ineptitudes of language as well as a master-disentangler of confounding and confusing phraseologies which are more fit for the bombastic jargon of the auction mart than they are for the Statute Book or legal documents where frequently they appear.

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It is only the practice of the law that can equip a man for such work and for the onerous duties of dispensing justice. There is no sphere of activity so deleterious to the would-be Judge or jurist as the political sphere.

It is said the Judges in the United Kingdom are appointed from the politicians; but there the lawyer first becomes eminent and distinguished in his profession before he ever turns his attention to political activity. It is because he has won the laurels of many a well-won conflict in the Law that he is welcomed into the fighting ranks of the political parties. If he reversed the order of his going, and first became a distinguished politician, the fact that he had a standing, without practice, at the Bar for 30 years would give him no claim to a Judgeship. No political party would dare to make such a man a Judge.

Why should men eminent only as politicians be made Judges?

The wrongs done by this infamous practice are appalling; and it is the public who suffer by the fact that the party seeking justice is driven from one Court to another till he finds it. And happy is he if he finds it at all, for the Bench of Canada is overmanned with politicians and undermanned with Lawyers. That is one of the reasons why the Privy Council is still indispensable to Canadian Justice.

B.T.

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ARE JOINT STOCK COMPANIES COMMON LAW CORPORATIONS?

By Bram Thompson, M.A.

ARTICLE 3: TEXT BOOK OPINIONS.

The object of the Articles on this subject appearing in the March and April issues of the C. L. T. would be imperfectly achieved without an examination of the views expressed by some juristic writers.

The text book has more potentials for propagating error than any other kind of legal instrument. The haphazard conjectures which text writers frequently scatter around them as solvents of grave and dubious complexities are all too prone to fall into congenial soil producing nebulous and vague chimeras whose tendency unfortunately is, not to vanish, but to solidify into irrational dogmatics. These the Court ultimately removes; but in the meantime it is the peculiar function of the Legal Journal to correct and expose the errors or misconceptions of these writers, and to counteract their effects on others as far as it is possible to do so.

On the unamenability of our Statutory Joint Stock Companies to the principle of *ultra vires* I direct attention to the following:—

In Company Law of Canada, by the Honourable Mr. Justice Masten and W. K. Fraser (Second Edition), at page 89, it is stated:

> "The Bonanza Creek Case holds that the Doctrine of *ultra vires* is not applicable to Companies incorporated by Charter in the absence of statutory restrictions added to what is in the Charter. Such a Company has the capacity to acquire powers and rights. If by the terms of the Charter it is prohibited from doing so a violation of this prohibition is an act not beyond its capacity and is, therefore, not *ultra vires*."

> "The Judgment of Viscount Haldane expressly states that the Doctrine of *ultra vires* does not apply to Companies incorporated

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by Charter in the absence of some restrictions in its constating instrument, and presumably the case is a decision on the *powers* of Companies generally."

In Dominion Company Law, by Thomas Mulvey, K.C., Under-Secretary of State, at page 114, it is stated:

"While the Doctrine of *ultra vires* is not applicable to Companies created by Letters Patent, it does not follow that the Directors of a Company are at liberty to enter into all transactions without limitations on its behalf."

In Canadian Companies and the Judicial Committee, by E. R. Cameron, at page xi., it is stated:

"Until the judgment of the Judicial Committee in the *Bonanza Gold Mining Co.* v. *The King* it was never suggested nor was the point raised in the Courts below that the *powers* bestowed by the Letters Patent were more extensive than those obtained by an ordinary private statute. The Committee, however, declared that this was the case. The Committee also held that the Company in question . . . . . had a *Status* which enabled it to accept from the Dominion authorities the right of free mining in the Yukon Territory."

In an Annotation on Corporations, by F. W. Wegenast, K.C., 26 D. L. R., page 310, it is stated:

"The Doctrine of *ultra vires* is not applicable to Companies incorporated by Letters Patent issued by the executive branch of the Government. This Doctrine . . . . . is apparently wiped out as regards Companies incorporated under Letters Patent under such Acts as those of the Dominion and the Provinces of Quebec, Ontario, New Brunswick and Manitoba."

In an Annotation on Company Law of Canada, by H. H. Donald, in 63 D. L. R., page 7, it is stated:

"The Bonanza Case decided that a Company had the capacity of a natural person to carry on business, and following this decision the Appellate Division of the Supreme Court of Ontario held that a Company is unrestricted as to the nature of the business it may carry on."

And again at page 34, it is stated:

"The Bonanza Case holds that a Company has the status of a legal person, and in the absence of Statutory restrictions added to what is written in the Charter is not governed by the Doctrine of *ultra vires*. It is also held that express provisions in the Companies Charter do not remove the capacity of a Company as a Common Law Corporation, although restrictions or prohibitions in the statute under which the Company is incorporated must be observed."

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It is clear that one idea runs through all these writings, and it is a fair conjecture that their parent was the Annotation of Mr. Wegenast, made in 1916. This Annotation appeared in the D. L. R. shortly after the decision in the Bonanza Creek Case. Mr. Wegenast, the writer of it, was one of the Counsel in that case, representing the Canadian Manufacturers Association before the Privy Council. He wrote then as a man with authority; and he asserted that that case had "wiped out" the Doctrine of *ultra vires* as regards Companies incorporated by Letters Patent under such Acts as those of the Dominion, Ontario, Quebec, New Brunswick and Manitoba. Since then the Statement, being itself an illusion, has bred nothing but illusions; and its latest progeny is the weakling of Mr. Donald, which has just appeared.

To any man with penetration below the exterior film there is nothing in the decision of the Bonanza Case to warrant the general assertion either that the doctrine of *ultra vires* is "wiped out" or is "not applicable" to the Company to-day, formed as it is under the Legislative authorities named. And much less is there warrant for the general statement that the Privy Council decision is one "on the powers of Companies generally" or that the "powers bestowed by the Letters Patent are more extensive than those obtained by an ordinary private statute," or that "a Company is unrestricted as to the nature of the business it may carry on," or that it has "the capacity of a Company as a Common Law Corporation."

The sole question before the Privy Council in the Bonanza Case, and the only one upon which it could pronounce a final opinion, was not the Company's powers *per se,* but the orbit within which the powers of the Bonanza Creek Company operated or had effect. The case revolved around the orbit, and not the powers themselves; and it was with reference to the orbit and not the powers that any question arose relating to the doctrine or principle of *ultra vires.* Failure to observe the radical difference between the two has produced

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all the confusion in the writers I have referred to, and in the case of *Edwards* v. *Blackmore*. By no possibility could the Privy Council have laid down what is attributed to it by this case, and by those writers.

When the Bonanza Case was before the Privy Council, the fact that the Company had been called into existence by Letters Patent, and not by the registration of a Memorandum of Association, evolved or developed a new aspect. Previously it had been regarded as a matter of indifference whether a Company received its formal incorporation in the one way or the other; and it was common ground that the principle laid down by the House of Lords in *Ashbury* v. *Riche*,[1] applied in either case. That principle is that the powers and capacities of an incorporated Company must be ascertained by the Statute authorizing the incorporation, and by the constating instrument signed and filed or issued pursuant to the Statute; and that anything not found there does not pertain to the incorporated Company.

In this aspect the argument was being long-drawn out as to the orbit of the vitality of a Provincial Company formed under an Act passed pursuant to the B. N. A. Act, section 92 (11), which authorizes "the incorporation of Companies with Provincial objects." Was it imperative that all the Company's powers should be exerted within the Provincial area? That was the question; and it was contended, strenuously, that any exercise of them outside that area was *ultra vires*.

Then it was that Lord Haldane saw a way out of the dilemma in the fact that while the Company was formed under a Provincial Statute its formal incorporation was effected by Royal Letters Patent issued pursuant to the Statute.

As against the opinion of Blackburn, J., in the Exchequer Court in the case of *Ashbury* v. *Riche*,[2] he agreed with Lord Cairns (7 H. L. 653), in the same

[1] L. R. 7 H. L. 653.
[2] L. R. 9 Ex. 224.

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case in the House of Lords, that in construing the powers of a Statutory Company it is wrong "to start by assuming that the Legislature meant to create a Company with a capacity resembling a natural person, such as a Corporation created by Charter would have at Common Law."

He says at page 578 of his judgment:—

"For to look at that analogy is to assume that the Legislature has had a Common Law Corporation in view, whereas the wording may not warrant the inference that it has done more than concern itself with its own creature. Such a creature where its entire existence is derived from the Statute will have the incidents which the Common Law would attach if, but only if, the Statute has by its language gone on to attach them. In the absence of such language they are excluded, and if the Corporation attempts to act as though they were not, it is doing what is *ultra vires* and so prohibited as lying outside its existence in contemplation of law. The question is simply one of interpretation of the words used. For the statute may be so framed that executive power to incorporate by Charter independently of the Statute itself which some authority, such as the Lieutenant-Governor, possessed before it came into operation has been left intact. Or the Statute may be in such a form that a new power to incorporate by Charter has been created directed to be exercised with the view to the attainment of, for example, merely territorial objects, but not directed in terms which confine the legal personality which the Charter creates to existence for the purpose of these objects and within territorial limits. The language may be such as to show an intention to confer on the Corporation *the general capacity which the Common Law ordinarily attaches to Corporations created by Charter.*

"In such a case a construction like that adopted by Blackburn, J., will be the true one."

These are the words which have created all the confusion. Ontario and Manitoba have enacted in Statutory form the words in italics as amendments to their Companies Acts. If thus they have transformed their Statutory Company into a Common Law Corporation or the equivalent of it, the feat of incongruity must be ascribed not to the Bonanza Creek decision, but to their skill as legislators. The Parliament of Canada has made no such addition to the Dominion Companies Act.

Now Lord Haldane was not here discussing what had been done either in Ontario or Manitoba or any-

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where else, but what might possibly be done by a Statute authorizing the formation of Companies and their formal incorporation by Letters Patent. It was an illuminative or preparatory discussion; and we will revert to it again when we discuss the powers *simpliciter* of such Companies, just as Lord Haldane himself uses it for the elucidation of what he himself was then solving or deciding, namely, the orbit of the operation of the powers, whatever they might be, of Companies formed in the way stated.

Immediately after the quotation set out he says:—

"Applying the principles so understood to the interpretation of Section 92 and of the Ontario Companies Act passed by virtue of it, the conclusion which results is different from that reached by the Court below. For the words of Section 92 are in their Lordships' opinion wide enough to enable the legislature of the Province to keep the power alive, if there existed in the Executive at the time of Confederation a power to incorporate Companies with Provincial objects but with an ambit of vitality wider than that of the geographical limits of the Province. Such Provincial objects would be, of course, the only objects in respect of which the Province could confer actual rights. Rights outside the Province would have to be derived from authorities outside the Province."

He next proceeds to find out if, at the time of Confederation there existed in the Executive Government of Upper and Lower Canada under the Constitution Act, 1840, the power to incorporate Companies "with an ambit of vitality wider than that of the geographical limits of the Province." He finds such a power did exist; and that under sec. 12 and sec 65 of the B. N. A. Act, 1867, it had been divided between, and transmitted to, the Dominion and the Provinces of Ontario and Quebec for the purpose of the legislative authority allotted to them respectively under secs. 91 and 92 of the B. N. A. Act. And as it was thus transmitted it remained till altered by legislative authority. He shows that a Company incorporation by Letters Patent under the Act of the old Province of Canada in 1864 was unlimited as to the orbit of its operation—its vitality; that the Company incorporated under sec. 5 of the Dominion Companies Act and the Company incorporated under sec. 9 of the Ontario Companies Act are both incorporated

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under this transmitted prerogative power, and are both in the same position, and that

"subject to the express restrictions in the Statute it is by the Grant under the Great Seal and not by the words of the Statute, which merely restricts the cases in which such a grant can be made, that the validity of the Corporation is to be measured."

Vitality you see—the orbit of the potential operation of the Company's powers whatever they were—is the sole subject of this learned and highly ingenious disclosure, unfoldment, and determination. The relative potentials and effects of the Letters Patent and the Statute are clearly set forth. The power itself is not defined. It is kept clearly apart from the orbit of its operation; and Lord Haldane concludes by declaring if the Legislature of Ontario had not interfered, the general character of an Ontario Company constituted by grant would have remained similar to that of a Canadian Company before Confederation; that is to say its orbit of operation—its vitality—would have been universal, subject of course, to any *lex loci* with which it might need to conform.

It is with reference to this aspect, and only with reference to this aspect, of the Bonanza Case that Lord Haldane says:—

"It appears to them (the Privy Council) that the doctrine of *Ashbury* v. *Riche* does not apply where as here the Company purports to derive its existence from the act of the Sovereign and not merely from the words of the regulating Statute. No doubt the grant of a Charter could not have been validly made in contravention of the provisions of the Act. But if validly granted it appears to their Lordships that the Charter conferred on the Company a status resembling that of a Corporation at Common Law subject to the restrictions which are imposed on its proceedings. There is nothing in the language used which, for instance, would preclude such a Company from having an office or branch in England or elsewhere outside Canada."

Remembering what Lord Haldane was unfolding, this is all clear. The Charter could grant nothing in contravention of the Act; but the Charter could supply something not incompatible with it.

We withhold further comment here; and take another stage with Lord Haldane.

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Having found that the powers and rights which the Province can bestow either by Legislation or through the Executive are confined to those exercisable within the Province, Lord Haldane unfolds the difference between actual powers and rights and the capacity to accept extra-Provincial powers and rights. Then he repeats, on this subject of capacity, practically what he said on the subject of vitality, or the orbit of operation of a Provincial Company's powers whether created by Charter entirely or by Statute entirely. He never discusses at any point the powers of the hybrid Company constructed by Statute and merely vitalized by the Statute's instrument or generator—the Charter; for that would have immersed him in just what he had no necessity to decide, but what nevertheless the interpreters of his judgment persist in saying he did decide—the question whether the Charter does not complementarily confer on a Corporation everything incident to an individual *compos mentis* which the Statute authorizing the incorporation does not expressly prohibit.

Lord Haldane is now discussing capacities to accept extra-Provincial powers or rights and nothing else, and he says the restrictions of sec. 92 (11) B. N. A. Act do

"not preclude the Province from keeping alive the power of the Executive to incorporate by Charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they preclude the Province from legislating so as to create by or by virtue of Statute a Corporation with this general capacity. What the words really do preclude is the grant to such a Corporation, whether by Legislation or Executive Act, of powers or rights in respect of objects outside the Province while leaving untouched the ability of the Corporation . . . . to accept such powers and rights if granted *ab extra*."

He says the Ontario Legislature had not restricted the Lieutenant-Governor's prerogative authority in this respect, and that therefore the Bonanza Creek Company had *the capacity to acquire* in the Yukon a right to carry on its Mining operations there.

Thus far, I submit, that there is nothing to prove or justify the assertion that the principle or doctrine of

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ultra vires is by the decision in the Bonanza Creek Case destroyed or wiped out. On the other hand it was very much in evidence, and given effect to in that very case.

We have seen that the statutory limitation, though it was an affirmative and not a negative limitation, of the prerogative authority to grant Letters Patent to Companies incorporated "for Provincial objects," prevented these Letters Patent from imparting a vitality—a power or right to operate—beyond the limits of the Province. And it was only because there was no statutory restriction or prohibition against acquiring *ab extra* a right or power of operating beyond the Province, or rather because it was quite compatible with an orbitally circumscribed Company that such a right or power should exist, that the Privy Council held the Bonanza Creek Company had, in virtue of its Charter, the capacity of acquiring that right or power in the Yukon.

The Provincial Letters Patent Charter in other words did not carry with it, or impart to the Bonanza Company, either the status or the incidents of a Common Law Corporation; and if the Bonanza Creek Company, without acquiring a new right or power to operate its authorized Mining business in the Yukon, had simply gone there in ostensible exercise of its powers under its Ontario incorporation it would inevitably, and according to Lord Haldane's own judgment, have been acting *ultra vires*; and its contract with the Dominion would have been void on the principles of *Ashbury* v. *Riche,* as decided by the House of Lords. So that *ultra vires* is not "wiped out."

We know where we stand with Companies formed and incorporated entirely by or within a Statute without invoking the prerogative aid of a Letters Patent Charter. The principle of *ultra vires* applies to them. Their powers and capacities are coterminous, and are restricted to their objects which can only be changed by compliance with the Statute.

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But where do we stand with Companies formed as they are by the Companies Acts of the Dominion, Ontario, New Brunswick and Manitoba? With the exception of the formal act of incorporation, which is effected by Letters Patent, these Companies are identical in their conception and in their main features with those in the other Provinces where incorporation is effected by merely registering the Memorandum of Association.

All of these Companies are joint-stock limited-liability Companies. The basis of them all is an agreement, sometimes called a Memorandum of Association, made between and signed by the parties desiring incorporation. Its form is prescribed by the Statute, and it sets out the objects or purposes for which incorporation is sought, the capital; and various other particulars; and it terminates with an agreement to take the shares subscribed for by the parties in the Company when incorporated on that basis.

The subscribers and all future shareholders are *inter se* partners. The Corporate Body or Entity is restricted and controlled by the Statute in the interest of the shareholders; and it stands to them, just as its Directors, in turn, stand to it, in a trust or quasi-trust relationship.

These Companies have not generated from nor are they in any material respect like the Common Law Corporation which was a juristic person fully *compos mentis* and invested, as such, with all the powers and capacities of an individual person.

The statutory joint-stock limited-liability Company is a juristic person, too, but limited, restricted, and controlled as a Trustee. It cannot do what it likes as an individual and as the Common Law Corporation could do. It must follow its objects, and it has no power beyond them, unless in so far as its creating Statute authorizes it. That is beyond dispute as to Companies incorporated merely by registering the Memorandum of Association.

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But under the Companies Acts of the Dominion, Ontario, Quebec, Manitoba and New Brunswick, these Companies, instead of being incorporated by the registration of the Memorandum of Agreement or Association, are incorporated by the issue of Royal Letters Patent. It is a crude and antiquated notion, which even Great Britain long since discarded. That does not help us. But does this fact—this Letters-Patent incorporation—invest Companies with all the powers and capacities of a Common Law Corporation except in so far as there is an express negative prohibition against them in the Statute?

Assuming there is no such statutory prohibition, can these Companies, merely by virtue of their Letters-Patent Charter, abandon the objects for which they were incorporated and embark in new objects or add new objects to the old objects; and have they the same power in carrying out the new as they had in carrying out the old objects? If the principle of *ultra vires* is "wiped out" by the Bonanza Case they can do so.

Without the authority and aid of a Legislative Enactment the prerogative authority of the Sovereign could not create these Companies at all. They are not, therefore, Charter Companies. It is the Statute and constating instruments of the Statute which form and mould and fix the character, scope and attributes of the Company, limit the liability of its members, and ascertain or fix the objects for which it is incorporated. But it is the Letters Patent Charter that vitalizes this statutory creature and makes it a Corporate entity. In doing so, does it infuse into the Corporate Body every power and capacity of a Common Law Corporation which is not expressly prohibited by the Statute?

If it does, the Company Law of this country is in a sorry plight; and its greatest achievement is to run counter to the current of constitutionalism, or Parliamentary control, since the Revolution onward, by augmenting and making more absolute than ever the Sovereign Prerogative of the King *solus*.

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I submit that such an absurdity cannot be. But that is what the Text-writers assert.

When the Prerogative is brought into operation merely to incorporate the creature already formed by the Statute, it subserves the Statute and cannot override it by transforming the restricted creature of the Statute into the absolute entity—the juristic person fully *compos mentis*—which the Common Law Corporation is. To do so, would be a tyrannic demolition of the partnership character of the Company as between the shareholders of it, designed and worked out by the Statute. These shareholders subscribe for, and invest in, the stock or shares on the basis of the adherence by the Company to the objects for which it is incorporated; and can their rights to insist upon this adherence be taken away by a Prerogative Charter granted or issued solely for these objects, and for no others, except in so far as they themselves may change them under the terms of the Statute?

The prerogative, I submit, is used only for the purposes for which it is invoked; and it adds nothing to the Company's powers beyond what an incorporation by mere registration would impart. If it did, the Prerogative would be making law and creating rights between parties, not only contrary to their own agreement, but contrary to the Statute; and of such a power the Sovereign *solus* has been divested ever since the Revolution and the Bill of Rights established the pre-eminence of Parliament over the Sovereign *solus* in all matters of Legislation.

It is not the Sovereign's prerogative in its plenitude of power that is utilized by the Legislature in incorporating these Companies. Its full flow does not pass to the incorporated Body; but only so much as the Statute authorizes, and as is necessary for the purposes of the Statute and of the Company which it constructs. Whatever the Company receives as power is statutory and not prerogative power. The Charter which trans-

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mits this power is an instrument of the Statute which converts to its own use what it needs, and no more, for the Company's objects.

The Company's vitality or the orbit of operation of its power is another problem; and it should not cloud this issue. I have already disposed of it.

Lord Haldane, it will be remembered, said in the Bonanza Case that the position of Companies incorporated in this way is a question of interpretation; and he deprecated an analogy with the Sutton Hospital Case, unless one could assume the Legislature in constructing a Corporate Body had in contemplation the formation of a Common Law Corporation. That neither the Parliament of Canada nor the Legislatures of the Provinces of Ontario, Quebec, New Brunswick and Manitoba contemplated anything like a Common Law Corporation, is abundantly manifest from the partnership nature of the limited company. They intended a purely statutory company but, neophytic adulators as the old Eastern Colonies were, and saturated up to the neck with feudalistic notions, they liked the ringing clang of the words "Royal Letters Patent Charter," and so adopted that form of incorporation without knowing what it meant or the risks they ran in using it. Indeed it is said the system was an imitation of that in the States, where the Charter of the Statutory Company is granted by the Governor. But the Governor in the States is merely an Official of the Government, like the Registrar of Joint Stock Companies; while the Governor or Lieutenant-Governor in Canada represents the Sovereign and his Prerogative. What a failure to grasp this radical constitutional fact; and with what a result! ! Between 1862 and now have they not learned the folly of their mistaken phrases?

Be the explanation of the incongruity what it may, it is certain that neither the Parliament nor the Legislatures in Canada intended to create anything but a Statutory Company entirely under their own control. All that is in the Companies Acts is evidence of this. If it was meant merely to form Companies with the

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powers of Common Law Corporations, why weave out the long pages of statutory provisions and restrictions, particularly the parts relating to the constating documents and the method of changing their objects or enlarging the powers of the Company?

If the theory that the principle of *ultra vires* is dead is true, these restrictive provisions are worthless so far as concerns the control of a Company's objects or its powers relating to them.

Further evidence that a Common Law Corporation was not intended to be created is to be found in the Acts authorizing the incorporation by Letters Patent Charter.

The Dominion Companies Act (R. S. C. 1906, ch. 79, sec. 29 (5) states that upon incorporation the Company shall be invested with

"all the powers, privileges and immunities requisite or incidental to the carrying on of its undertaking as if it were incorporated by a special Act of Parliament embodying the provisions of this part and of the Letters Patent and supplementary Letters Patent to such Company."

Here the powers of the Company embodied in the Letters Patent are statutoryized and placed upon the same basis as they would be if the incorporation had been effected by a Special Act of Parliament; and this alone, and quite apart from what I have already advanced, precludes any possibility of the Dominion Company being anything like what these various writers have said it is. Its powers are statutory, and the principle of *ultra vires* is in full force against any violation of them.

Manitoba has not quite the same provision, but sec. 17, R. S. M. 1913, ch. 35, states that:

"all powers given to the Company by the Letters Patent . . . . shall be exercised subject to the provisions and restrictions herein contained."

And sec. 19 provided that:

"supplementary Letters Patent may be granted extending the powers of the Company to any objects . . . . which the Company may desire."

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New Brunswick has in its Act provisions similar to these.

The effect of these provisions is to prevent the Company from changing its purposes or objects without procuring supplementary Letters Patent; and for this the shareholders have to render an assent. This asserts the dominancy of the Statute and the *ultra vires* principle.

Ontario's Act is truly a conundrum. It is the worst of all the Acts; and it is the worst specimen of legal draughtsmanship I have ever seen, unless it was designed to create confusion and litigation. Were it not for the governing principle of *non possumus,* it is lax and vague in the extreme; and if the feat is accomplished at all, it is this enactment, and not the decision of the Bonanza Creek Case, which has, in Ontario, abrogated the doctrine or principle of *ultra vires.* This Act was, however, always interpreted till the case of *Edwards* v. *Blackmore* as creating a pure statutory Company amenable for any violation of its powers to the doctrine or principle of *ultra vires.* But when the Bonanza decision threw a new light upon this mysterious statutory structure, the Legislature, instead of rectifying its flaws, added to the absurdities by conferring upon it "the capacity which the Common Law ordinarily attaches to Corporations created by Charter." It was this clause, too, and not the structure of the original Act, which formed the basis of the decision of *Edwards* v. *Blackmore.* Yet it is the structure itself, and not this amendment, which makes it dubious whether, in Ontario, we have not, and have not had for years, the anomalous creation of a joint-stock limited-liability Company formed on a strictly partnership basis between the shareholders who are simply at the mercy of their Corporate Entity, and have no remedy, under the principles of *ultra vires,* by injunction or otherwise, to restrain its most wayward and wanton gambols with its assets or their capital.

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The addition or amendment of 1916 did not add anything to what the Company already was, except a legislative instead of a prerogative absurdity.

I leave it there to be rectified and clarified by the Legislature. It is the only anomaly in Canadian Company Law unless it has a twin sister in Quebec; and of that I have no knowledge *pro* or *con*.

When discussing the amendment made in 1916 to the Companies Act in Ontario, I feel I should add a word or two on the amendment in 1917 to the Act in Saskatchewan.

Under the Act, as passed, the Company in Saskatchewan is a purely Statutory Company, and is controlled entirely by the principle of *ultra vires* expounded by the House of Lords in the case of *Ashbury* v. *Riche*.

The Act, as passed, raises none of the questions we have been discussing in regard to what are called Charter Companies. More than that it enacts in sec. 7:

"A Company may not alter the conditions contained in the Memorandum except in the case and in the mode and to the extent for which express provision is made in this Act."

What then, in light of this, is the meaning of the Amendment in 1917 (R. S. S., ch. 76), that—

"such incorporation shall so far as the capacities of such Companies are concerned have . . . . the same effect as if the Company were or had been incorporated by Letters Patent under the Great Seal"?

It looks to me like tacking to a sparrow the wing of an eagle, and thinking a miracle of transformation had been accomplished.

What kind of Letters Patent are referred to? Are they Prerogative Letters Patent or Letters Patent issued pursuant to and for the purposes of a Statute; and what is the use of capacity without power?—are questions presented which those responsible for the amendment should answer. To me the words have no meaning. They are too vague for comprehension. They are at variance with all the rest of the Act. Certain it is, they cannot affect or change the actual powers of the Company in face of the provisions of sec. 7, which

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I have just set out; and they cannot transform, as if by magic, the Company from what it is from its foundation upward—a pure statutory Company—into a Common Law Corporation or something analogous to it.

The Joint Stock Company in Saskatchewan is just where it was under its original constitution, except that it has now the capacity to acquire extra-Provincial rights and powers in so far as the Provincial Legislature could confer that capacity.

I sincerely hope this will give us new notions of the principle of *ultra vires*, and that we will in future halt before forming general conclusions from discursive phrases dropped or thrown out, even by such august dignitaries as the Privy Council.

BRAM THOMPSON.

Regina, May 10th, 1922.

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LEGAL EDUCATION IN CANADA.

By R. J. Maclennan, K.C.*

In this year, when legal education has been chosen as the chief topic for discussion, it may not be out of place to refer to some phases of the subject and to build a few castles in Spain. If, as lawyers, we are to enjoy our professional work and attain some measure of success, before we disappear from the sight of our fellows, we must continue to be students, for in a sense legal education only really begins as we pass from the class-rooms of the law-school. We are also teachers, as we help our own students or the juniors who become associated with us. We take on a learned air as we instruct our clients in the law, or argue with our brother lawyer, privately face to face, or at long distance through the post. The teaching becomes more strenuous when, before a judicial arbitrator, we seek to show from our superior wisdom that we are right and he is wrong.

It becomes us therefore to maintain a continuous interest in legal education. It should be our duty and pride to have a share in moulding the growth of our law school and in making it more perfect. The memory of many goes back to the days when we had no law school. It is true there were lectures at Osgoode Hall in the early morning, but these were voluntary and did not interfere with a full day's work in a law office, followed by a laborious night in which the student wrestled with Morpheus or the prescribed text books. It was not necessary for students to come to Toronto until they were ready to write on the official examinations. It is a far cry from that time to the present advantages and peculiar attraction of our Osgoode Law School. It is not a matter of surprise

* This address was delivered at the recent annual meeting of the Ontario Bar Association by the President, Mr. R. J. Maclennan, K.C. It is instructive and illuminative and should produce beneficial results.

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that none of our Ontario Universities have been able to establish a real law faculty. The lure of Osgoode Hall has always been strong, the atmosphere of the courts, the great library, the spacious grounds, the arches and pillars in the architecture of the front of our rambling buildings, the beautiful interior court with its gallery and tiled floors, the several court rooms and the growing collection of judicial portraits; all these made it inevitable, when a law school was established, that it should be connected with this lovable old building. Shall we not hope that nothing may draw it away? The principals and the presidents of our universities may voice regret, that they are not educating students in the mysteries of the law, for the profession which is not exceeded in honour and learning by any other. It behooves us therefore to cherish an institution which is really part of ourselves, and to see that it maintains a premier position in the legal life of Canada. It has been well said that the burden of improving the standard of legal education rests upon the bar as a whole, and not simply upon the law schools, and that the bar organizations must shoulder the burden and bear it with a real sense of obligation.

We have chosen legal education as a topic for our meeting so that we may keep abreast of the times. The lawyers on both sides of the Atlantic are discussing the subject. The President of an English Law Society in his recent annual address said that his Council hoped to see the establishment of an Imperial School of Law. At the last meeting of the Canadian Bar Association the same hope was expressed, and a glowing picture was given of what such a school should be. It should be near the law courts in London. Suggestions were made as to the curriculum, the staff, methods of teaching, teaching material, research, teaching standards, recognition of overseas schools, graduate courses and the bond which would be created between students from all parts of the Empire.

In England no general address to lawyers seems complete without some reference to legal education.

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In the last volume of one of the best known legal journals several addresses to lawyers are printed, and from these it appears that the Britishers are discussing the same problems that lawyers in America are trying to solve. Both agree that a considerable amount of knowledge should be acquired before a student enters a law school. We have recently increased our own standard from Junior to Senior Matriculation, and this has also been done in some of the other provinces. The American Bar Association seeks to make the standard two years of University work and this is now the standard in Manitoba. It is significant that a large body of our students voluntarily take a full Arts course before they commence to study law. It is true that some of our most successful lawyers have never attended a university, and it is argued that so high an entrance standard is not necessary. We can answer, they would have been more successful still, if they had received the additional training. It is doubtful, says an English writer, whether the study of law between the ages of 18 and 22 is the best study which a student can select, and he adds, our best and most successful practising lawyers have, between these years, read classics, or mathematics, or other subjects, which give a wide mental stimulus and outlook.

Another important consideration is, should a student attending a law school give his whole time and undivided attention to his studies, and be prevented from serving in an office during the school term? Opinion is divided on this. Sometimes it is the convenience of the practitioner and not the good of the student which is given most weight. Those who seriously study the subject are convinced that the best work is done when the school takes the whole time and attention of the student. The practice in a law office can be acquired between the school terms or during a continuous year or more after graduation. We have all experienced the relief which comes when examinations are over and the office can have the undivided attention of the student. Let us again quote from an

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English writer: "Legal education is always a question of settling the respective claims of the abstract and the concrete. The student who has only the general principles of jurisprudence in his head, will not get far with a draft conveyance or with a procedure summons, and the student who has confined himself to the details of office routine will miss the wider outlook in the domain of law which makes the cultured lawyer."

The American Bar Association is seeking actively to create conditions which will tend to strengthen the character and improve the efficiency of those admitted to the practise of law. This is a very laudable objective. In 1913 its committee on legal education requested the Carnegie Foundation for the advancement of teaching to investigate the conditions under which the work of legal education is carried on in the United States. It was stated that the Bar Committee had not at its disposal either the funds or the time required for a comprehensive investigation. The Foundation proceeded at once, and deserves the thanks of lawyers the world over for the three reports which have already appeared. Dr. Josef Redlich, of the faculty of law and political science in the University of Vienna, was brought to America before the war to examine methods of study in Law Schools. His report of some 100 pages, entitled "The Common Law and the Case Method" was issued in December, 1914. The next Bulletin, as these reports are called, of about 300 pages, called "Justice and the Poor," prepared by Reginald Heber Smith of the Boston Bar, was published in July, 1919, and has already gone into a second edition. The third, and perhaps the most valuable report, entitled "Training for the Public Profession of the Law," a book of over 500 pages, was printed in June, 1921. The author, Mr. Alfred Z. Reed, is not a lawyer, but is one of the scholars employed for research work by the Carnegie Foundation. He further entitled his report as the "Historical Development and Principal Contempoary Problems of Legal Education in the United States

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with some account of conditions in England and Canada." These books may be read with advantage by every lawyer, and they are sent without charge to any person upon request. They have already aroused a good deal of interest and discussion.

The American Bar Association, having been furnished with this mass of information, and with the promise of more to follow, decided to proceed with its own programme, and in September last adopted certain resolutions which are in substance: A Law School should require before admission two years of study in a college; the law course should be at least three years of the student's whole time; there should be an adequate school library, and most of the teachers should give their entire time to the school to insure personal acquaintance and influence with the student body. It was also resolved that a student's fitness to practise should be passed upon by some public authority, and that a list of all law schools in the United States should be prepared, divided into those which give a standard equal to the above and those which do not, so that intending students might know what school to choose. It was also agreed that a general conference should be called to consider the proposals.

This conference was held at Washington on the 23rd and 24th of February last, and both our Association and the Law Society were invited to send delegates. The problems placed before the meeting covered: Justification for two years of college experience; the effect of college experience in relation to ideals and conduct; economic conditions in relation to obtaining two years of college work; technical education; where the law-office fails; the part-time law school; and the touch which should exist between the student and practitioners of high ideals. More than 150 law associations were represented at the meeting and some of the delegates were from Canada.

There was much discussion, some notable addresses and some sharp differences of opinion on the amount of preliminary education which should precede entrance

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to the law school. In the end, however, the recommendations of the American Bar Association received the almost unanimous approval of the meeting.

In Edinburgh recently the president of a Scots Law Society made an address to lawyers in which he used such apt phrases as these: "We are all conscious of a certain affectionate pride in our Profession cherished in some corner or other of our hard hearts. We spend our lives in trying to learn the law which it is our business to declare to others and of whose mysteries we are the prophets. It is a paradox in the employment of legal service that the paramount allegiance of the lawyer is due, not to his client, but to the law. In other words, his duty to his client is in perfect loyalty to the law." These quotations serve to emphasise the importance of a thorough legal education which will give the ability to find the sources of the law and to draw from them the legal principles which will compel right conduct and fair dealing.

One of the safe-guards proposed by the American Bar Association is that the fitness of a graduate law student should be considered by some public authority before he is admitted to practise. It seems to me that a fairer way would be to apply this test before a student is accepted for registration in the law school. From what has happened in the lives of some who have been members of our Law Society, we know that the scrutiny has not been severe enough, if there has been any examination of fitness at all. This matter of fitness is vital, if the honour of the profession is to be faithfully guarded. The past decade has seen an abnormal addition to our ranks. Since 1911 the population of Ontario has increased by sixteen per centum, while the increase in the legal profession has been over forty. There are now considerably over 2,400 lawyers practising their profession in our province. It has been claimed that we are overstocked, because the young men found it easier to get through a law course than to qualify for any of the other professions, and the fact that the fees were somewhat high did not seem

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to keep any one back. It is a matter of great regret that the legislature from year to year opens a breach and send into the profession, and against the judgment of the Benchers, men who seek to escape the full rigour of the curriculum. We must never forget the truth of the maxim, "there is no royal road to learning," and that it applies to legal education.

Another of the American Bar ideals is a sufficient number of teachers giving their entire time, to insure actual personal acquaintance and influence with the whole student body. Those of us who are not graduates of any law school obtained such inspiration as was available from the lawyers to whom we were articled. Our present solitary full time and worthy principal cannot be expected to leaven the whole lump. We want more full time teachers. The lack of adequate personal acquaintance and influence is reflected in the character and quality of our bar. We find it in the administration of our own association. We are too busy scrambling for fees to take much interest in the general development of our profession; too frequently we get up our law by proxy; we have not been inspired to aim high enough or to leave some great work behind us; we generally decline invitations to give addresses or to read papers on branches of the law in which we have become experts; too often we have to import our principal speakers; we have few text-book writers, and some of the results are best termed pot-boilers; and, speaking with all respect, the quality of our bench, as a whole, might be a little higher still, had our Judges, when students, been inspired by sympathetic teachers to look forward to and to prepare for a judicial career. In some countries a special course of legal education is provided for those who seek a position on the bench. In seeking to improve our own school it might be well to provide a few lectures for each senior year, on the education and qualifications necessary to make an ideal Judge or Magistrate, because in every law school class there will always be a few young men who will eventually hold

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the scales of Justice. Such addresses could be given in rotation by some of our outstanding Judges, and if printed would be useful as information for new appointees.

Speaking still with respect, I desire to say a word which I hope may reach the ears of some of those who have been lately elevated to the bench. Recently, as president of this Association, I ventured, in congratulating one of our Judges, to express the hope that he would fully realize that it is possible to attain distinction on the bench as well as at the bar. Some of the profession are content to move along in a hum-drum fashion, forgetting that none of us can know all the law, and that a Judge as well as a lawyer should continue to be a student. It might be a powerful incentive if more of our Judges could be seized of the great responsibility they have in shaping the development of our common law, especially in their written judgments which pass for all time into the reports. We have all noted with pride, judgments which are models of literary style and logic and which give us in simple and brief form a clear and immediate grasp of the principles discussed; but alas, all are not so, and after we have floundered through page after page of tedious matter we sometimes wonder what it is all about and start again. How different from the living memorials which distinguished Judges have left, and are leaving, strewn along the legal pathway as it threads its way through the reports.

We hear a great deal about legal education for the students, but very little of continuation courses for lawyers. The Law Society does not entirely overlook our post-graduate educational needs. It keeps up our great library at Osgoode Hall, with a smaller one for the Benchers and another for the students. It encourages and supports a library in each County where there is a Court House. We are all compelled to pay substantial dues, and as consideration for part of this we are sent the weekly and monthly parts of our official reports. It would be interesting to know how

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many make proper use of these. In too many offices the parts are never bound, they are piled in out-of-the-way corners and become untidy, dusty heaps, and of little or no use for reference. It might be better if they were sent to us as bound volumes. If we were compelled in the same way to subscribe for a well edited Bar Journal, such a periodical might tend to keep the whole body of lawyers in touch with what is going on in all parts of the legal world, and in a sense be an element in legal education. It is significant that the Canadian Bar Association hopes to publish such a Journal.

Our Law School ought to have provision made for post-graduate work, for the granting of degrees, and, above all, it should be provided with scholarships of sufficient value to enable deserving graduate students to continue their studies either at Osgoode Hall or by travelling to some of the great educational institutions in England or in the United States. In recent years Judges and lawyers have died leaving substantial estates, and there are still among us those who will do likewise. What better memorial could a lawyer leave behind than his name attached to a foundation scholarship of this sort. May we hope that this reference shall bear fruit when new wills or codicils are being drawn. The income from a legacy of $50,000 would super-educate one student a year for all time, and then what satisfaction to the founder himself, as he observed from the "twentieth-plane" the profitable course of his investment, or later discussed with his legatees the value of legal education as they in succession reached the self-same plane.

Are we following the best practice in awarding scholarships to the student who can cram the hardest and often forget the quickest? Would it not be better to give them for original work or to those who show the most intelligent interest in their studies during the law school course? Here lies another argument for the appointment of teachers devoting their

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whole time to the law school, and qualified to award such prizes.

When we peruse our Ontario Statutes, which relate to the profession of the law, we do not find any power to grant degrees to graduates from the law school. The benchers may call to the bar and they may admit and enroll as a solicitor. It has been the custom, nevertheless, in the diploma of a Barrister-at-law to cause it to be remembered that the person in question has been duly called to the degree of Barrister-at-law. It seems only reasonable that there should be authority to grant ordinary and honorary degrees when they relate to legal studies. It has been humourously remarked that the ordinary University honours every outstanding statesman, or politician or literary genius who comes along by making him a doctor of laws, when it would be more consistent to make him a doctor of divinity, because as a rule he knows something of theology and nothing of jurisprudence.

Would it not stimulate those of us who have been in practice for a longer or shorter time, if once in a while we had for our own benefit a special course of evening lectures from a competent teacher in the law school? Lectures of a general character and prepared for the purpose might inspire and tend to keep us up to the mark. In this connection the view has been expressed that it would benefit the profession if each Treasurer of the Law Society occupied the responsible position for one year only, and that each occupant should be charged with the task of tackling annually some constructive work outside of the statutory routine. It seems to be the custom in England to have an annual public address from the chief officer of law societies. If we could establish such a custom, and combine such an annual deliverance with a few lectures from a law professor, it might go far to keep our profession still farther in the forefront as the most learned.

We are often puzzled by another whim of the politicians who appoint laymen to positions which require

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legal knowledge and training, with the result that the unfortunate holder of the sinecure sits with a troubled conscience in an inner office while he watches an underpaid assistant do the work outside. He is timid because he dreads the approach of some robust citizen who wants to consult the head and not the subordinate and who will not be denied entrance. We had in Ontario, before a process of reduction began, 93 Judges and we still have over 200 police magistrates, and many of these latter have never had any legal education at all. Every magistrate should have been a lawyer, and we would be well supplied if the number did not exceed the number of County Court Judges.

What shall we say about the education of those who make our laws, the members of Parliament, and of the Legislature? Here, if anywhere, there should be some measure of special legal education, and at present there is none. Here is another opportunity for our law school, if it only had the right kind of teachers. A series of addresses for legislators, showing what is practical and ideal in solving the problems of society and the State, would be a guide to the intelligent making of laws. At present, the lack of experience and special knowledge sends a large part of the legislators' duties to be performed by special committees and Commissioners.

There is yet a broader side to legal education than any so far mentioned. Lawyers have no vested rights in the body of the law; law reigns supremely over all citizens, and each must do, or not do, as commanded. If we disregard the law we become liable to the penalty, and, as we all know, ignorance of the law is no excuse. Should we not, therefore, endeavour to educate our people in some way or another, so that they may know more than they do of certain statutes and municipal ordinances, especially those which relate to matters of health, traffic, domestic relations and other classes which can be mentioned? It is true that for two years

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at least the Government of Ontario has issued a public Service Bulletin containing notes on legislation recently enacted, which is free on application, but it is probably seen by few. It may be that the money would be better spent if it were used in purchasing space in the daily press for the publication from time to time of selections from our Statutes. Matter of this sort would have a news value greater far than much of what is spread before us. Might we suggest to our newspaper friends that their reporters would be better employed in compiling legal news of this sort, than in spreading before the public police court records and the careers of paroled prisoners seeking a fresh start in life, lists from the land registry offices and particulars from the small estates of humble citizens which tend to increase the sorrow of the widow and the orphan, and are of no general interest.

Education and examinations may, to some of us, seem away in the past, nevertheless the continual acquisition of legal knowledge must, as we have already said, never cease, and a little self examination, or introspection, as the doctors call it, may be good for us from time to time. Suppose, of an evening, we seat ourselves alone in our library, the lights turned low, books and papers about us, and take a backward look and ask ourselves whether as lawyers we have always been the kind of men we ought to have been, or have the legal services we have rendered been the best we could have given. Then, when we find that we cannot give very satisfactory answers, let us turn in the other direction and roam in fancy into the future. We may next ask what is our serious purpose as lawyers, what is our aim in the realm of law and when do we expect our professional work to end. We were taught as children that our chief end is to continue for ever. Answers to these questions may help to steady us and to clear our vision and give us glimpses that are not limited by the confines of time. In imagination we can make pictures, such as were dreamed by Homer and Virgil and Dante, but the people we can picture

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as alive and full of work are those who were honoured members of our own Law Society, as well as other Judges and lawyers, and our aim may well be to lay foundations now which will enable us to play a worthy part when we compare notes with them. This matter of introspection can, with advantage, be called into action best at certain important epochs in our lives, as when word has come that a new King's Counsel has been named, or that an appointment has been made to the Bench, or even when an election has taken place to any post of honour which a lawyer is justified in coveting. We should therefore seek legal wisdom and experience, and so shape each day's work that we may fulfil our destiny in ways that may be as perfect and satisfactory as possible in the "for ever" before us. The fact that our profession has to do with moral and spiritual adjustments, as well as with material questions, also leads us to hope that the usefulness of a lawyer will continue beyond the bourne of time. Doctors will have to leave their instruments behind, for there will be no physical bodies to operate upon, but engineers and scientists may be able to solve some of the mysterious problems which now baffle them. It may be that the professions which deal with Religion and Justice will in the distant future form a combine. Considerations of this sort, which we seldom mention to one another, may well inspire and stimulate us as we go on our way, with our eyes on the future. It has been said that one great advantage in the study of history is, that it makes us acquainted in advance with the eminent men who died before we were born, and whom we hope to meet in the fields of Eternity. What shall we be prepared to say, when we thus meet and discuss the past with the great lawmakers and lawyers from Moses down?

Recently one of the greatest of the British journalists, while moralizing on the careers of the young men who went so cheerfully to the War, and died ere their prime, writes as follows: "Some of us must revise our conceptions of the future, as a state of mere

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rest and praise, a kind of happy trance; for surely it will not be a mere contrast to the best life on earth, but rather a transfiguration of that life, not a languid ecstasy, a paradise of inaction, but a state in which the whole nature springs into a new vividness of activity. Our tools will not be taken from our hands just when we have learned how to handle them. We will carry with us into the other world capacity as well as character, and we may trust the great Overseer to see that it does not go unused."

R. J. MACLENNAN.

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THE COURTS AND THE COMMONWEALTH.

By Charles Morse,

*Registrar Exchequer Court of Canada.**

We are assembled on this occasion to commemorate certain events in the early history of Nova Scotia. Conceding this to be the reason for our presence here, let me ask what it was that impelled us to come and take part in this celebration? Regarding more particularly the event in respect of which I have been given a place on the programme, namely, the establishment here some two centuries ago of a Court of Judicature administering the English Common Law—the first to appear in the country now known as Canada—do we come merely with the idea of doing homage to the memories of certain men who, in a vanished day, set up a scheme of social order that has faded and left not a wrack behind, or does our presence indicate that we are persuaded that these men were not only the pioneer builders of an enduring political community which has not yet attained the fulness of its stature, but were also the chosen instruments of Providence for enlarging the New World boundaries of civilisation along the lines of English polity? If my latter suggestion be the correct one, then indeed we shall have caught the true meaning and value of this celebration; for it is only in this way that we can view it from the vantage-ground of the philosophy of history. Speaking generally, the purpose of history viewed from that vantage-ground is not to thrill our souls with the personal achievements of soldiers and statesmen of a by-gone age—fascinating and inspiring as the contemplation of them may be—but rather to lead us to discern, behind and underlying all their

* This paper was read before the Historical Association of Annapolis Royal, N.S., at a meeting which formed part of the celebration, in August last, of the bi-centenary of the founding of the first Civil Court of Judicature in British North America.

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achievements, the working of that impalpable and pervasive force — call it what you will, Providence, Destiny, the *Volksgeist*, or the soul of the race — which used these great men as instruments in attaining its ideals and aims. That, I think, is what Carlyle means when he speaks of great men as texts in "that divine Book of Revelations, whereof a chapter is completed from epoch to epoch, and by some named History" (Sart. Res. c. VIII.). Moreover, we cannot apprehend the unity of purpose in history if we estimate the spirit of a particular epoch as something disparate and unrelated to that of the past or that of the present. There is no effectual break in the chain of continuity. Upheavals and impediments may deflect it here and there but the stream of tendency holds its onward course. The ideals and aims of present-day civilisation are the product of past social thought and practice. Superficially they may appear to be as guiltless of pedigree as the plutocrats that emerged from the recent War; but in reality they bear the indelible impress of genesis and causation traceable to an earlier age than ours. Even the Dark Ages are not so tenebrous that they throw no light on modern civilisation; nor can the roaring of the young lions of our weekly press effectually drown the voice of the early-Victorian conscience, or that of the mid-Victorian taste.

This is undoubtedly the view of the unity and purpose of history held by many of the ripest minds of modern times. The late Frederick William Maitland—who added to his supreme qualifications as a scientific historian the quality of a master of the art of letters—said:—"Such is the unity of all history that any one who endeavours to tell a piece of it must feel that his first sentence tears a seamless web."[1] Mr. Delisle Burns supports the view with great lucidity in a recent work:—"The past is so entangled with the present that we cannot understand the political situation in civilised countries without continued reference to situations no longer in existence. To speak platitude then,

[1] Law Quarterly Review, Vol. 24, p. 13.

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—History is an explanation of how we come to be doing what we usually do. . . . Thus unless history gives us some practical knowledge it is useless. It must show us how to change the present into a better future, by showing how the past became the present. . . . A certain amount of good, along with evil, exists in the present relations of men and States: that good is in part an old ideal realised, in part a basis for further progress.'"[2] Professor Frederick J. E. Woodbridge expresses himself in the same sense when he says:—"History is itself essentially the utilisation of the past for ends, ends not necessarily foreseen, but ends to come, so that every historical thing, when we view it retrospectively, has the appearance of a result which has been selected, and to which its antecedents are exclusively appropriate. In that sense purpose is discoverable in history."[3] Indeed, it would seem that Cicero nearly 2,000 years ago anticipated these modern views when he said:—"*Quid enim est aetas hominis, nisi memoria rerum veterum cum superiorum aetate contexitur.*"[4]

And so it would be idle to commemorate any notable event in the early history of our young country without endeavouring to apprehend its pragmatic value for our own times.

What I have predicated of the purpose of history in the large is equally true of every particular field or department which it embraces. *Pace,* Sir John Seeley, and his opinion that political science is not a thing distinct from history but inseparable from it. (Introd. to Pol. Science, Lect. 1). I like to think that history has as many fields as human life has; and that to identify it with the science of politics is not only to defer its beginning to a comparatively recent age—for political science emerged from the thought of Aristotle and not earlier—but to restrict the boundaries of its reasonable domain and rob it in a large measure

[2] Political Ideals, pp. 11, 12.
[3] The Purpose of History, p. 4.
[4] Or, ad M. Brut., 34, 120.

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of its activities. History must be larger than any one science because, regarded as the medium by which order or purpose in human affairs is revealed, it is a science in itself. But I cannot labour the point. My present concern is with the purpose of history as related to that early event in the political annals of Nova Scotia to which I have already alluded. I shall not be embarrassed in my consideration of it by the knowledge that the Court was a crude experiment so far as its constitution was concerned, and confessedly temporary in its purpose. It could not be otherwise, seeing that no serious attempt was made by the British government to settle the country until some thirty-six years had elapsed after the Treaty of Utrecht. If I only saw in the creation of this Court of Justice at Annapolis Royal in 1721, an official act more or less worthy of notice in the early history of British rule in the Atlantic provinces of Canada, then, of course, my interest in it would be purely antiquarian. But when I find in it proof of the persistence of racial traits throughout the course of civilisation, when I discover that the minds of the men who set up this Court were dominated by the desire—a desire amounting almost to a passion — for political institutions stable and yet benign, that has been one of the characteristics of the English race since the date of Magna Charta, then I feel that I am in touch with a real and living bond between the eighteenth century and the preceding centuries that are embraced in the period of our political development. I am led to rejoice in this event because it stimulates my patriotism, strengthens my faith in the ideals of those who framed the basic structure of our free institutions, and deepens my insight into the purpose of history in recording the epochs of progress of a race strong in the will not only to live but to live well. Hence its pragmatic value to us in these days when the voice of the pessimist is telling us that the present distress of nations is only the prelude to a new and awful dark age. (Cf. Dean Inge's "Outspoken Essays," *passim.*)

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It is apparent to every one who reads with any degree of care the official documents dealing with the matter that Governor Phillips, and those associated with him in the government of the colony at the time, were responsive in a very ample way to the political ideals of the race to which they belonged. They were constrained by the strong bias of the English group mind for Order. Now the great lesson that Rome of the Cæsars teaches modern times is that Order is the one foundation upon which that political entity we call the State can rest secure. It is also true that Liberty is essential to civilisation, and that a State whose people are not free can never progress. But Liberty without Order is a vain and inconstant thing, as Matthew Arnold very clearly reasons out in his "Culture and Anarchy."[5] France, at the close of the eighteenth century, and Russia, in our own day, have afforded very dreadful demonstrations of this truth. Order, then, is to be regarded not only as the *élan vital,* but as the guarantee of Liberty. Again Order can only be realised and made operative through the machinery of the Law, and the administration of the Law is of course the business of the Courts. This is true of western civilisation as a whole; but it is more particularly emphasized in English polity and its American derivative than in that of other nations. We have only to read Montesquieu and de Tocqueville to be convinced of that. Thus we are led to see that the Courts must perform a very important function, not only in the early stages of social development, when men have to be taught the hard lesson that civil liberty means the subjection of the individual will to the collective will of the community, but also in conserving the equilibrium between the rights and obligations of citizenship when social relations grow more complex. It is a function of nation-building in a very real sense; and it is a function of tutelage when the nation has developed into a State.

[5] Cap. II.

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I am much pleased that Mr. Justice Chisholm's admirable and fully documented articles in recent numbers of the *Virginia Law Register* and the *Dalhousie Review* relieve me of the necessity of inviting your attention to any lengthy abstracts from the official papers relating to the foundation of Governor Phillip's Court. I shall, therefore, treat it as a more or less familiar event in history, having its place in the development of English judicature beyond the confines of the home-land. My particular undertaking is to link up this event with its antecedents. To do this I must make a more or less comprehensive retrospect of the past. If I rested on Sir Frederick Pollock's view perhaps I need offer you no apology for this undertaking, because he says that it is no more possible to be a serious student of history without learning a good deal of law, than it is possible to draw the human figure correctly without learning its anatomy.[6]

In entering upon this retrospect I am sustained by the opinions of two writers of undoubted authority. In his most fascinating sketch of the Law Courts, entitled *The King's Peace,* Mr. Inderwick speaks of the wonderful development of English polity through the wisdom and courage of the judges in the Law Courts, and without the active interference of Ordinance or Statute. He says: "The more freely this subject is discussed the more clearly will it appear that our laws have been framed and our procedure has been settled in the interests of the people; and that for their benefit these Courts exist; that through the medium of the Courts internal quiet is secured, contracts are enforced, rights are respected, and injuries are redressed; and that the safety, the freedom, and the social happiness of our nation are mainly dependent upon the fearless and impartial administration of the King's Peace."[7] Language similar to this is used by Beamish Murdoch, the distinguished commentator on Nova Scotia Law.[8] Professor William

[6] Essays in Jur., etc., cap. VIII.
[7] Intr. p. XVIII.
[8] See his Epitome of N. S. Law, Vol. 3, Bk. iii., p. 49.

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McDougall, who regards nationhood as essentially a psychological conception, and posits mental organisation, rendering a people capable of collective deliberation and collective volition, as the prime condition of nationhood, makes this observation: "It is owing to the unbroken continuity of the English nation through so long a period that its organisation is so stable and plastic, its national sentiment so strong, its complex uncoded system of judge-made law so nearly in harmony with popular feeling and therefore so respected. National organisation resting upon this basis of custom and traditional sentiment is the only kind that is really stable, that is not liable to be suddenly overthrown by internal upheavals or impacts from without. For it alone is rooted in the minds of all citizens in the forms of habit and sentiment.[1]

I have said that the desire for political institutions of a type that is at once stable and benign has been characteristic of the English people ever since the date of Magna Charta; and my reason for doing so is that, whether you call the famous document "a treaty between the King and his subjects" (Stubbs), "un compromis ou un pacte" (Boutmy), or "a legislative act, more or less of an institutional and exceptional nature" (McKechnie)—there we have the first organic expression of the will of the nation, born of the fusion of Anglo-Saxon and Norman, that justice according to law should be systematically administered in the realm of England. It symbolized the purpose of the time-spirit to correlate the Norman instinct for centralised government in the hands of the king with the Anglo-Saxon prepossession for popular rights — in other words, to set up in the commonwealth that had emerged from the blending of the two races a reign of law over king and people wherein Order would be the complement of Liberty. Tennyson makes one of his characters in *Harold* express a very profound constitutional truth of the time in a single phrase:—

[1] The Group Mind, pp. 100, 145.

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"The voice of England is the choice of England." It strengthens our confidence in the purpose of history when we realise that this is as true of the twentieth century as it was of the eleventh century. William the Conqueror had small liking for popular liberty as he found it in Saxon England, but he cared less for feudal anarchy. He saw how greatly his interest in checking the power of the barons could be served by declaring his adhesion to the old laws and the old polity. He felt himself quite equal to departing from both when occasion demanded—and he did, but that is another story. So we find him strengthening his right to the throne by the vote of a body claiming to be the Witan, swearing the ancient coronation oath, and receiving his crown from the same English prelate who had anointed the last of the Saxon kings.[10] Next we find him declaring that he would adhere to the law of the land as it stood in the days of Edward the Confessor, with such additions as he himself made for the benefit of the English. Hence, so far as English law and polity are concerned, the Norman Conquest did not mean the throwing away of what was worthy of permanence, but rather the conservation of it. Into the vessel of the new epoch was poured all that was vital in the old. Despite his opportunism, William's statesmanship in the eleventh century paved the way for the wonderful constitutional achievements of the thirteenth. Without it we could hardly conceive of the charters of Henry I. and Stephen being granted in the twelfth century, containing, as they do, declarations that these monarchs had been respectively "elected" to the throne. Nor do I believe that without it Magna Charta would have been won in the thirteenth century from John, who had so degraded his election by the people as to surrender his kingdom to the Pope and become his vassal.[11] It is the triumphant revival of the ancient power of the people to compel

[10] Cf. Green Hist. Engl. Peop. i., 115; Taswell-Langmead, Eng. Const. Hist. c. II.

[11] Cf. Anglo-Saxon Chron., s. a, 1100; Feilden's Short. Const. Hist. Eng., p. 8; Taswell-Langmead's Eng. Const. Hist., 7th Ed., c. VI.

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the king to govern according to law that makes the epoch in which it occurred of such absorbing interest to the student of English social history. The thirteenth century is not only a supremely important link in the general chain of historical continuity, but it is the bridge over which the interpreter of our modern constitution must pass in his search for its old-time origins. It was the age when England laid the foundations of a State that combines the political ideals of the two great civilisations of the past—the Liberty that was Greece and the Order that was Rome. From that combination has resulted representative Government, England's peculiar contribution to civilisation in the large. And this State is unique, there is none like it in Europe to-day—authough Cavour tried to make it the constitutional norm for Italy. It is a State in which the individual is free before the law, but in which the collective will governs. Nor does it bear any resemblance to the Hegelian conception of the perfect State, which the experience of one nation in our own time has shown to be portentously imperfect. Granting this we can cheerfully listen when Dr. J. N. Figgis observes: "The modern post-Reformation State *par excellence* is unitary, omnipotent and irresistible, and is found in perfection not in England."[12]

I know there are writers who echo the inextinguishable laughter of the gods over the attribution of any consciousness on the part of John and his barons of the momentous part they were playing on the political stage, and would have us believe that neither the king cared a fig for the maintenance of the rights of the Crown in the abstract, nor the barons for popular rights outside the ambit of their immediate concern. In fine, we are exhorted to regard the theory that Magna Charta was the result of a deliberate adventure of the collective mind upon state-craft as a "fond thing vainly invented." Probably it were wise to leave John out of the question, although his petulant enquiry: "Why do not the barons, with these unjust exactions,

[12] From Gerson to Grotius, p. 15.

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ask my kingdom?" connotes some understanding of the constitutional implications of such demands. Be that as it may, there is much to be found both in the language of the Charter itself and in the surrounding facts of the time which would lead to the conviction that at least one of those who were asserting the rights of the people had a fairly adequate conception that what was being done would not lightly pass away with the pressure of the moment, but would stand as a permanent contribution to the principles of constitutional government. I speak of Archbishop Langton, who was not only the real leader of the barons, but who, if he did not draft the famous document with his own hand, was chiefly responsible for its framework. Langton was educated in the University of Paris when the revival of the study of jurisprudence in Europe was going strong. He became renowned there as a canonist. It is a present-day commonplace that out of the study of the Roman law, and its derivative the Canon law, in the Middle Ages, grew our modern political theories.[13] Even in the twelfth century the scholars were disputing as to whether sovereignty, that is to say the supreme power in the community, was reposed in the king or the people.[14] Dr. Figgis makes the following observation upon the political value of the *Corpus Juris* to the medieval and Renaissance mind: "It became . . . right down to the beginning of modern politics, not so much a jurist's code, as a compendium of political philosophy, and could be appealed to at any moment as an argument. The very first condition for understanding the rise of modern politics is that of realising how Scripture, Artistotle, and the *Corpus Juris,* and above all this last, united to form the seed-plot of all political ideas."[15] Hence, Langton brought to his patriotic endeavour a knowledge of civil government that would justify the inference that what he was striving for was not a temporary victory for the disaffected barons over the king, but for stable

[13] Cf. Gierke, Pol. Theor. Mid. Age 1.
[14] Vinogradoff, Rom. Law in Med. Eur., p. 58.
[15] From Gerson to Grotius, p. 226 n.

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measures of constitutional limitation upon the power of the Crown. Langton knew well what would happen to England if the will of the prince was to be the law of the land. He was mindful of what despotism tempered by anarchy meant in the reigns of Rufus and Stephen; nor did he overlook the constitutional reforms that were won by the people in the reigns of the two Henrys.

When we turn to the text of the Charter itself for evidence that permanent constitutional reform was its purpose, we have that evidence in abundance. As is said by Pollock & Maitland:[16] "Every one of its brief sentences is aimed at some different object, and is full of future law." It is not surprising, in view of the great part played by Archbishop Langton in obtaining the Charter, that its opening chapter declares that "the English Church shall be free, and shall have her rights entire, and her liberties inviolate." The very fact that the title "*Anglicana ecclesia*," the "English Church," is used instead of the title "Holy Church" as employed in the earlier charters of Henry I., Stephen and Henry II., is eloquent of the birth of a national consciousness. It must be remembered that John was then a vassal of the Roman pontiff, and his acknowledgment of the freedom of the English Church extended not only to freedom from his own exactions, but from those of his lord-paramount as well.[17] So that the concession of liberty to the English Church had a very important bearing on the civil liberties of the English people. It is equally true that advantage to the kingdom as a whole accrues from provisions in the Charter conceding what appears to be merely special or class privileges. I know that there are commentators on the Charter (*e.g.*, Dr. McKechnie, *op. cit.*, p. 464) who speak lightly of the democratic strain in its provisions, and disagree with early authorities, such as Coke, and more recent authorities like Stubbs, who think that chapter 60 is a recognition of the liberties of the whole mass of the nation in that it declares: "All

[16] Hist. Eng. Law, 2nd Ed., p. 171.
[17] Cf. McKechnie's Magna Charta, p. 192.

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these aforesaid customs and liberties, the observance of which we have granted in our Kingdom as far as pertains to us towards our men, shall be observed by all of our kingdom, as well clergy as laymen, as far as pertains to them towards their men." But what matter if the term "their men" (*suos*) in this chapter should be held to refer only to the sub-tenants of the king's feudatories? It is reasonably clear that the intendment of this provision in the Charter was to grant such liberties to all who were embraced in the term "freemen," as it was then understood, and that is enough for our purpose. How humble a person was included in the term appears by chapter 30, which protects the horses and carts "of any freeman" against forcible requisition for the king's use. And yet it would be a mistake to ignore the fact that at that period the lower classes had but a small place in political life. "Freeman" has been a word of ever widening meaning in the vocabulary of English politics. But the widening process has been slow. In Elizabeth's time we find Sir Thomas Smith in his *De Republica Anglorum* classifying "day labourers, poor husbandmen, merchants or retailers which have no free land, copyholders, and all artificers as tailors, shoemakers, carpenters, brickmakers, bricklayers, masons, etc.," as persons having no voice or authority in the commonwealth. But he generously, and withal quaintly, adds: "they be not altogether neglected. For in cities and corporate towns for default of yeomen, inquests and juries are impanneled of such manner of people. And in villages they be commonly made churchwardens, aleconners, and many times constables, which office toucheth more the commonwealth, and at first was not employed upon such low and base persons."

It is interesting in this connection to recall the provisions of 7th Henry IV. c. 15 (1406), which permitted not only all freeholders, but all *freemen*, present at the County Court on the day of an election of knights of the shire, to exercise the franchise. Now this happened at the very beginning of our legislation respecting the electoral franchise, and it is of tremendous

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importance to him who delights to analyse the phenomena of the national or group mind. However, this untimely flower of democratic citizenship was found to encourage corrupt practices by the sheriffs, and it was ruthlessly rooted up some twenty-four years later by the 8th Henry VI. c. 7 (1430), which restricted the qualification of County electors to *freeholders,* and to such freeholders who possessed "free land or tenement to the value of forty shillings by the year at least, above all charges." Indeed it was not until the nineteenth century was far spent that the landless man in England could be regarded as a citizen in the Aristotelian sense, *i.e.,* one having a share in the ultimate sovereignty of the State.

All said and done, whatever else in the way of popular liberty Magna Charta achieved for us, it indubitably set up the corner-stone of the foundation upon which the English theory of monarchy is erected. It denied the right of the king to impose financial burdens upon his feudal tenants without their consent, and so became the touch-stone in later days of those who denied the right of the king to impose taxation without the consent of Parliament. It enabled Bracton, a few years after the famous Parliament of Runnymede, to declare that the law was a bridle for the king, and that his subjects could put the bridle on him when he needed it; it sustained the House of Lords three centuries later in advising Queen Elizabeth to marry for the welfare of the nation—a perilous adventure upon the temper of that imperious virgin; it emboldened Coke to warn the advocates of divine right in the reign of the first Charles that the sovereign power of the King was a term unknown to the English Parliament; and lastly, it justified the deposition of that silliest of our kings, James II., and the election to the throne of the foreigner William of Orange and his wife, Mary Stuart, in 1689.

(To be concluded in June issue.)

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THE POWERS OF COLONIAL LEGISLATURES.

By Prof. W. Harrison Moore, C.M.G.

In the recent case of the Initiative and Referendum Act (1919), A. C. 935, 945, the Judicial Committee of the Privy Council, speaking through Lord Haldane, says:—

> Section 92 of the British North America Act, 1867, entrusts the legislative power in a Province to its Legislature and to that Legislature only. No doubt a body with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in *Hodge* v. *The Queen*, 9 A. C. 117, the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise.

It should be observed that the Privy Council held, many years ago, that the Provincial Legislatures of Canada had the benefit of sec. 5 of the Colonial Laws Validity Act, 1865,[1] so that the question raised by their Lordships would seem in their view not to be unequivocally answered by the provisions of that section.

The nature and extent of the power of colonial Legislatures has been considered in the Privy Council on several occasions in relation to the delegation of powers.[2] It is now one of the commonplaces of constitutional law that these Legislatures are not to be deemed the delegates of the Imperial Parliament, whose Act creates them, and defines their powers. When they legislate the case is not one of the Imperial Parliament making laws through them, though there are expressions in the Privy Council judgment in *Webb* v. *Outtrim*[3] which suggest it.

[1] *Fielding* v. *Thomas* (1896), A. C. 600.

[2] *R.* v. *Burah* (1878), 3 A. C. 889; *Hodge* v. *The Queen* (1883), 9 A. C. 117; *Powell* v. *Apollo Candle Co.* (1885), 10 A. C. 282.

[3] 1907, A. C. 81.

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Every Act of the Victorian Council and Assembly requires the assent of the Crown, but when it is assented to, it becomes an Act of Parliament as much as any Imperial Act, though the elements by which it is authorized are different (p. 88).

The principles of agency throw no light even by analogy on the nature and powers of these Legislatures, not being delegates of the Crown or of the Imperial Parliament or of the people. The rule which forbids the agent to delegate his powers does not apply to them. It does not follow, however, that because they are not agents their powers are unlimited. Like every other person or body whose power is derived from statute, their powers are limited by the grant; and it may be that some limit on the power of delegation is inherent in the terms of the grant.

The power to make laws, extensive as it is, was vested in a designated authority and in no other. Whatever claims obedience as law must establish its claim to that character as being made or imposed by that prescribed authority itself. All the Privy Council decisions referred to are at pains to show that the particular delegation in question was by an Act wherein the Legislature itself had exercised its own discretion over the subject-matter dealt with. Thus in *R.* v. *Burah*,[4] an Act of the Governor-General in Council removed a particular district from the jurisdiction of certain existing courts and offices, and placed it under new courts and offices to be appointed by the Lieutenant-Governor of Bengal; and authorized the Lieutenant-Governor to apply to such district or any part of it any of the laws in force in other territories subject to his government; and the Act was to come into operation on such day as the Lieutenant-Governor should direct. The effect of what was done was that

"the proper Legislature had exercised its judgment as to place, person, laws, powers; and the result of that judgment had been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute."

[4] 3 A. C. 889, 905.

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At the same time, their Lordships agreed

"that the Governor-in-Council could not by any form of enactment create in India and arm with general legislative authority a new legislative power not created or authorized by the Council's Act" (*i.e.*, the Indian Councils Act of the Imperial Parliament, 24 & 25 Vict. ch. 67).

In *Hodge* v. *The Queen*,[5] the Privy Council speaks of the action of the Ontario Legislature in committing to Commissioners authority to make regulations for the conduct of licensed premises as a step having for its object the carrying of the enactment into operation and effect, such an authority being ancillary to legislation, a power without which an attempt to provide for varying details and machinery to carry them out might become oppressive or absolutely fail (p. 132). And, as to the argument that by its action the Legislature effaces itself, the Board said:

"It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands."

In *Powell* v. *Apollo Candle Co.*,[6] it had been decided in the Supreme Court of New South Wales that a provision in the Customs Act authorising the Governor in Council to direct a proportionate duty to be levied on any article which in the opinion of the collector or commissioners of customs contained properties which made it a substitute for a dutiable article, was void as an imposition of taxation by the Governor in Council, the Constitution having conferred the taxing power on the Legislature alone. The Privy Council held that in such a case the duty was levied under the authority of the Act—

"the Legislature has not parted with its perfect control over the Governor, and has the power of course at any moment of withdrawing or altering the power which they have entrusted to him" (p. 291).

THE CONTROL OF THE DELEGATING LEGISLATURE.—One limitation upon the disposing power of a Legislature appears clearly from these decisions: the legislative power of delegation imports the retention of

[5] 9 A. C. 117. [6] 10 A. C. 282.

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complete control by the delegating Legislature. In general this condition would be satisfied by the fact that the Legislature can repeal its own Act, and that therefore the retention of control is inherent; any authority it set up must be subordinate to it. But the matter is not quite so simple. If the King, the Legislative Council and Legislative Assembly, in whom the legislative power is vested, should purport to confer a general concurrent legislative power on some one or two parts of the Legislature, or on some other authority, there would be an act which, if valid, was an abdication of control; the Legislature would be as much subject to control by its creature as capable of controlling it. Nor, again, would the inherent power of repeal cover the case in which a Legislature purported to abolish itself and confer its power on another person or body in substitution for itself.[1]

In regard to such cases it may be said with confidence that such an abdication by a colonial Legislature could not be justified under its legislative power, plenary though it is. The Imperial Parliament having designated the body which shall be competent to exercise legislative power in subordination to no other authority than the Imperial Parliament itself, the establishment of some other authority of equal status either along with or in supersession of the designated body is inconsistent with the grant itself, and is an alteration of the constitution and the powers established by the Imperial Parliament. Only when a further power—the power to alter the constitutions and powers of the legislative body — has been conferred could acts of the kind now under consideration be justified. Such powers have been conferred in many colonial constitutions, and are in the case of representative Legislatures conferred generally by the Colonial Laws Validity Act, 1865, sec. 5.

Is the retention of control by the Legislature the sole condition which governs delegation? Would it be lawful to commit to, say a Royal Commission, full

[1] Cf. Dicey. The Law of the Constitution, 8th Ed., p. 66, note.

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power to make laws for the peace, order and good government of the colony in all cases whatsoever, subject to the limitation that any law made by such Commission inconsistent with any Act passed by the Legislature shall be invalid, and that the Commission may make no law which relates to the constitution or powers of the Legislature itself? To take a specific case.[8] In 1871 the Law Officers of the Crown were called on to advise upon a suggestion that the Legislature of the Cape of Good Hope might establish within a colony a number of subordinate provincial legislatures. The Secretary of State, in a despatch to the Governor, announced that the Law Officers advised that the Cape Legislature had no power, without the assistance of the Imperial Legislature, to divide the colony into Provinces and to invest the provincial authorities with legislative and administrative powers subordinate to a supreme colonial Parliament.

To exercise such a power would be using the constitution created by the Letters Patent to destroy itself; the Letters Patent give the Legislature power to make laws, but it was not intended to invest it with power to make laws of every kind, but only such laws as are not inconsistent with the form of government constituted by the Letters Patent themselves. Nor has the legislature power to delegate to others the function of legislation entrusted to itself. It follows that the colonial Legislature has no power to divide the colony into provinces, if by that division anything more is intended than a subdivision for administrative purposes, which will leave untouched the constitution created by letters patent.[9]

The actual decisions of the Privy Council that have been referred to certainly do not establish as of author-

[8] The power of colonial legislatures to delegate to or vest powers in other authorities is referred to by various writers, notably in A. I. Clark's Australian Constitutional Law, pp. 41 *seq.*; Berriedale Keith's Responsible Govt. in the Dominions, pp. 355 *seq.*, 365 *seq.*; Clement's Canadian Constitution (1916), p. 35, and Lefroy's Canada's Federal System, pp. 69-75.

[9] Cd. 508, p. 13 (1872). See Keith, Responsible Govt., Vol. 1, p. 367.

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ity, so broad a claim, and the dictum cited from *R.* v. *Burah* denies it. In *R.* v. *Burah* and *Powell* v. *Apollo Candle Co.*, the Legislature had set up a complete legislative scheme, to be brought into operation when the Executive should determine and in the latter case had specified the grounds on which the executive determination was to be based. In *Hodge* v. *The Queen*, the matter is less clearly one of "conditional legislation;" but the power conferred is one which is to be exercised not for the whole province, but for particular districts with varying needs and desires, which the Legislature provides for by remission of the matters to local determination. In all the cases there had been some exercise of judgment and discretion by the Legislature itself on the subject matter dealt with, so that it was possible to regard the rule set by the delegate authority as one imposed by the Legislature itself. Powers to establish rules and regulations incidental to actual legislation, to carry out such legislation, to supplement and complete it, to fix time and place at which it shall come into operation, are all included in the power to make laws.

The subject of delegation by the Legislature has received much attention in the United States (see for example Cooley's Constitutional Limitations, p. 163, 7th ed., and Willoughby's Constitutional Law).

The leading case on the subject in the U. S. is *Field* v. *Clark*, 142 U.S., where, at p. 694, the following passage is cited with approval from the opinion of the Pennsylvania Court in *Moers* v. *City of Reading*:—

> "The Legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of the Government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making authority, and must, therefore, be subject to inquiry and determination outside the halls of legislation."

CONDITIONAL LEGISLATION.—In the Australian case of *Baxter* v. *Way*,[10] there was a provision in the Com-

[10] (1909), 8 L. C. R. 626.

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monwealth Customs Act establishing a category of "prohibited imports" and imposing a penalty on importation. The section set out an enumeration of prohibited imports, and included among them "all goods the importation of which may be prohibited by proclamation." The High Court of Australia held that this was "conditional legislation" by Parliament itself, and accordingly sustained a proclamation prohibiting the importation of opium. Isaacs, J. (at p. 641), says:

"The Governor-General does not legislate, using that word in the true sense. There is no subject handed over to legislate upon as he pleases without any substantive provision as to consequences by the Parliament itself."

With all deference to the Court, it is not very clear that the matter falls within the principle of conditional legislation. No direction or guide is given to the Executive; there is an unqualified power in the Executive to exclude anything on any ground or no ground. All that Parliament has done is to provide the means of coercion; its only will is that what the Executive has decreed as to the goods that may be imported is law. The other ground taken by the Court appears the stronger; that common experience shows that in certain classes of cases it is not practicable or desirable for the Legislature to do otherwise than leave the utmost discretion to the Executive. It would hardly be possible on any narrower ground to support the delegations of rule-making power that have been made to the Executive during the war.[11] The influence of accustomed methods is seen in the judgments in all the cases that have been cited above. Subjects differ from each other in their aptness for treatment by a representative Legislature. There is a distinction for instance between those matters which are essentially matters of administration to which legislation is really ancillary and on the other hand matters which are

[11] See also the Australian case of *Roche* v. *Kronheimer* (1921), to be reported in 29 Commonwealth Law Reports, where the High Court sustained the Treaty of Peace Act conferring upon the Governor-General a power to do all things necessary to give effect to the Treaty and a Regulation issued under the Act embodying provisions of the Treaty.

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essentially legislative with an attendant and incidental administration. Defence is an example of the first; there is a defence service to be organized, directed and controlled. The measures to be taken in the interest of defence, whether in peace or war, call for the exercise of a special kind of knowledge and judgment which the Legislature does not affect to possess. In such matters the Legislature exercises its judgment when it remits them to a competent authority. On the other hand, there are matters which are primarily matters of legislation, *e.g.*, bills of exchange, banking, marriage, property, and contract rights, as to which certainly the same practical reasons for delegation could not be assigned.

Legislative Powers in the United States.—In the United States the principle applicable to delegation appears to be that while the Legislature may commit powers, it may not delegate legislative powers, and much subtle classification and distinction goes to the solution of problems which arise in an ever-growing tendency to enlarge administrative discretion. But there are, at any rate, two considerations which distinguish the American situation from our own; first, that in the United States the Legislature is itself regarded as holding the legislative power by delegation from the people; secondly, that legislative, executive, and judicial power having been communicated by the constitutions to distinct organs, each is restricted to its own sphere and may not intrude on the others. Further, we must bear in mind the description of the nature of colonial Legislatures as repeatedly given by the Privy Council: "Plenary powers as large and of the same nature as those of Parliament itself (*R.* v. *Burah*);"[12] "authority as plenary and as ample within the limits prescribed . . . as the Imperial Parliament in the plenitude of its powers possessed and could bestow (*Hodge* v. *The Queen*);"[13] "a Legislature

[12] 3 A. C. at p. 904.
[13] 9 A. C. at p. 132.

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restricted in the area of its powers but within that area unrestricted (*Powell* v. *Apollo Candle Co.*);"[14] "if indeed it were repugnant to the provisions of an Act of Parliament extending to the colony, it might be inoperative to the extent of its repugnancy (see the Colonial Laws Validity Act, 1865); but with this exception no authority exists by which its validity can be questioned or impeached (*Webb* v. *Outtrim*);"[15] "the Legislature of Queensland is the master of its own household except in so far as its powers have in special cases been restricted (*McCawley* v. *The King*)."[16] "The nature" of the Imperial Parliament—putting aside any question that may arise as to the effect of the Parliament Act, 1911—is that it is supreme over all other authority, that any division or distribution of powers is dependent on its will; that it may assume non-legislative powers, that it may devolve legislative powers. Can we, in the case of a Legislature built after this model, say that the limits of its powers of devolution are reached when what is disposed of is found to be, not administrative or executive or judicial, but legislative in its nature?

But if it is once established that the Legislature may delegate not merely power supplementary to its own legislation but legislative power itself, are not all other considerations — the extent of the legislative power which may be delegated—matters of judgment and discretion which can be subject to no authority other than the Legislature itself? It is of the nature of the Imperial Parliament to determine which of its powers shall be exercised by authorities in subordination to itself. Granted that a colonial Legislature must not part with its supreme control, is there any other limitation upon delegation than the will of the Legislature itself? Would not Courts trained in the traditions of parliamentary sovereignty decline to enter upon the inquiries which under the influence of

[14] (1907), A. C. at p. 88.
[15] 10 A. C. at p. 290.
[16] (1920), A. C. at p. 714.

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the doctrine of people's sovereignty and the separation of powers, have proved so troublesome in American Courts?

THE CROWN'S POWER OF DISALLOWMENT.—There is one matter, however, to be considered here. The Acts of the colonial Legislature are subject to the power of the Crown, on the advice of Imperial Ministers, to disallow them. Other activities of the colonial Government, including those of the agents and instruments set up by that Government, are not subject to such supervision. It is therefore an objection to an unrestricted power of delegation that it may enable things to be established as law which, had they been set down in the Act of the Legislature itself, would have been in peril of disallowance on Imperial grounds. The case is not a fanciful one; discriminations have in some cases been made by rules issued by the subordinate authority which would hardly have passed scrutiny in an Act of Parliament. The answer to the objection appears to be that it is more political than legal, and that the Crown's power of disallowance if evasion is threatened must be protected by action taken when the delegating Act itself is passed. That is to say, if an Act is passed which by reason of its extensive delegation of powers suggests the danger referred to, the Crown can at that stage exercise its power of disallowance.

But colonial Legislatures to-day have more than a general legislative power. Under the Colonial Laws Validity Act, 1865, sec. 5, they may, as representative Legislatures, make laws respecting the constitution, powers, and procedure of such Legislature. The effect of this provision was recently considered by the High Court of Australia in *Taylor* v. *A.-G. for Queensland*.[17] In that case, an Act and a Bill of the Queensland Legislature were under consideration. The Legislature (which was of course a "representative Legislature" within the meaning of sec. 5 of the Colonial Law Validity Act) had made an enactment (The Parliamentary

[17] (1917), 23 C. L. R. 457.

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Bills Referendum Act, 1908) whereby when a Bill passed by the Legislative Assembly (the elective chamber) in two successive sessions, had in the same two sessions been rejected by the Legislative Council (a nominee chamber), it might be submitted by referendum to the electors and, if affirmed by them, was to be presented to the Governor for His Majesty's assent. It thus provided for an alternative Legislature exercising concurrent power with the King, the Legislative Council and the Legislative Assembly, the Legislature established by the original Order-in-Council founding the Colony in 1859. This Act having been passed, a Bill for the abolition of the Legislative Council was passed in two successive sessions by the Assembly and rejected by the Council. This Bill was then submitted to the electors under the preceding Act. The questions before the High Court were: (1) Whether the Parliamentary Bills Referendum Act was valid; (2) whether there was power to abolish the Legislative Council of Queensland by an Act passed in accordance with the provisions of the Parliamentary Bills Referendum Act.[18] The Court held (unanimously) that the Parliamentary Bills Referendum Act was a law respecting the constitution or the powers of the Queensland Legislature within the meaning of sec. 5 of the Colonial Law Validity Act; and that a Bill for the abolition of the Legislative Council was a law respecting the constitution of the Legislature within the same provision.

The "grave question" raised by the Privy Council in the Initiative and Referendum Act[19] — whether a

[18] The original proceedings were taken in the Supreme Court of Queensland, which granted an interlocutory injunction against taking the referendum. The Government appealed to the High Court which *pro forma* allowed the appeal for the purpose of removing the matter into the High Court, where it was argued upon a special case. Meantime, the Government having undertaken not to act upon the result of the referendum pending the decision of the Court, the referendum took place. The electors rejected the Bill, and consequently in the opinion of some of the justices, the Court ought not to answer questions which had become hypothetical, except so far as the answers to them should lead up to the determination of the matter of costs. The majority of the Court, however, held a different opinion.

[19] (1920), A. C. 935. 945.

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colonial Legislature "can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence," is thus answered by the High Court in the affirmative as to Legislatures which come under the Colonial Laws Validity Act. It will be observed that in this case there is no reservation of control by the Parliament of Queensland; the powers of the new legislative authority are as ample as those of the Parliament itself. The Parliament might no doubt repeal the Act of 1908 and thus restore its supremacy. But equally — if the Act were valid — the new legislative authority could destroy the old. In fact the argument on the second point—the power to abolish the Legislative Council—was directed to the question whether the Parliament of Queensland had itself such power. The Court rejected the argument that the power of a representative Legislature to make laws respecting the constitution, powers and procedure of such Legislature was limited by the obligation to preserve the identity of all the component parts of that Legislature. The Legislature was not, for instance, limited in respect to the Legislative Council to changes in the constitution of the Council, as by substituting a system of election for nomination; it might abolish the Council itself, substituting some other authority with all or any of its functions, or it might leave the powers of the Legislature to be exercised by the parts remaining, the Crown and the Legislative Assembly.

The Court did not go the length of holding that under sec. 5, the Legislature might substitute for itself some wholly distinct authority, constituted according to the uncontrolled will of the Legislature. Barton (p. 468), Isaacs (p. 474), and Power, JJ. (p. 481), were of opinion that probably the representative character of the Legislature must be maintained "as a basic condition of the power relied on." Duffy and Rich, JJ. (p. 477) expressed no opinion in the matter, as being unnecessary to the decision. Isaacs, J., was of opinion that there was a further limitation—

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"When power is given to a colonial Legislature to alter the constitution of the Legislature that must be read subject to the fundamental conception that consistently with the very nature of our constitution as an Empire the Crown is not included in the ambit of such a power" (p. 474).

Therefore the Crown was an essential part of the legislative authority and could not be eliminated by the Legislature.

In rgard to the first limitation suggested by their Honours it is necessary to recall the terms of sec. 5 of the Colonial Law Validity Act—

"Every representative Legislature shall have . . . full power to make laws respecting the constitution, powers and procedure of such Legislature."

It is plain that any Act made pursuant to sec. 5 must rest on the continuance of legislative authority; it would be a mere invalidity if the Legislature should do as Lord Bryce and Professor Dicey (Law of the Consitution, 8th ed., p. 66, note) have suggested a sovereign Legislature might do—repeal all laws relating to its constitution, dissolve itself, and make no provision for its successor. A valid exercise of the authority given by sec. 5 must be directed to the constitution of a Legislature; but as the qualification for the exercise of the power is the representative character of the Legislature, and as the subject matter is the constitution, powers and procedure of such Legislature, it is not unreasonably inferred that the maintenance of this representative character is "somewhat fundamental."

The matter may be put in a slightly different way. While the Legislature may devolve its powers on any authority constituted as it pleases so long as it retains its own supremacy, no body created by the Legislature could have concurrent power or the full succession of power unless it was a "representative Legislature," for it would not be qualified to exercise the powers of sec. 5 of the Colonial Laws Validity Act itself, powers which the Legislature could not abdicate without providing an authority constituted to exercise them.[20]

[20] Prof. Berriedale Keith (Responsible Govt., Vol. 1, p. 366) appears to be of different opinion. While he is of opinion that a colonial Legis-

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The other fundamental limitation suggested by Isaacs, J., is more doubtful. It was argued against the Act that if under the power to make laws respecting the constitution of the Legislature, Queensland could eliminate the Council, it could also eliminate the Assembly or the Crown from the Legislature. The position of the Assembly has been considered. As to the Crown, Isaacs, J., considered that the term "Legislature" in the expression "constitution of the Legislature," in sec. 5 of the Colonial Laws Validity Act, must be read as excluding the Crown, and he cited many instances in which the term is used even in Statutes to describe the chambers of the legislative body, and not the full legislative authority itself. This meaning, however, unless it is forced upon us by the terms of any particular case (as in sec. 7), is in the present Act inadmissible; for the definition section expressly declares that in this Act the term Legislature signified the authority other than the Imperial Parliament or Her Majesty in Council competent to make laws for the colony. Such authority includes the Crown or the Governor, according as the constitution of the colony has designated the one or the other as the head of the law-making authority. There is one point at which the colonial Legislature, under sec. 5, cannot eliminate the Crown—the Crown's power of disallowing colonial laws, which according to what seems the better opinion, is exercised by the Crown not acting as part of the Legislature, but in a superintending capacity.[21] It is not, therefore, comprised in a power to make laws respecting the constitution of the Legislature.

The Crown's power of disallowance and the inability of the Colonial Legislature to reach it under sec. 5 is especially related to his Honour's argument from

lature cannot merely extenguish itself with no provision for the continuance of legislative authority, he holds (as I understand him) that a representative Legislature may, under sec. 5, substitute for itself a non-representative authority, which authority can exercise the power given by sec. 5 of changing its own composition as a Legislature—that it is in the fullest sense a successor. See also p. 425.

[21] Cf. Clark's Australian Constitutional Law and Brinton's Coxe's Judicial Power and Unconstitutional Legislation, pp. 205 *seq.*

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"the very nature of our Constitution as an Empire." The supervisory power exercised in the case of every Legislature by the Crown on the advice of the Imperial Ministry has a real significance of legal and constitutional unity, as has the supremacy of the Imperial Parliament. If, however, His Honour applies the argument to the Crown as an assenting party to legislation, and as a part of the actual law-making authority, the implication is not very strong. Colonial constitutions do in fact vary as to whether the King is made a part of the law-making authority—in a number of cases the Governor figures, and not the Crown.[22] No doubt the power is conferred upon the Governor because he is the representative of the Crown, but it is none the less a statutory function which belongs to him in such cases as *persona designata* and to no one else. A century's legislation has reduced to a fiction the old theory that executive power was vested in the Crown alone as matter of law;[23] both in the United Kingdom and in the Colonies great numbers of executive acts are done by and in the name of the particular officer charged with their execution. In the case of a Colonial Legislature there seems nothing fundamental or Empire-binding in the actual position of the Crown as part of the law-making authority. There is at the present day a dangerous tendency to rely overmuch on the unity of the Crown despite the fact that it acts through distinct and perhaps conflicting agencies.

There remains this question. Let it be assumed contrary to what is suggested above, that the generality of a Colonial Legislature's delegation of a power to make laws in subordination to itself is subject to some limitation, and that it is possible to find some principle which will trace the line between what they may do and what they may not do. We have seen also that many Acts which as depriving a Colonial Legislature of its control over a legislative power would have been plainly invalid, as in substance altering the constitution

[22] For examples see Keith, Responsible Govt., Vol. 1, p. 458.
[23] See Maitland, Constitutional History, p. 415.

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or powers of such Legislature, are now valid under the power to make laws respecting the constitution and powers of such Legislature conferred by sec. 5 of the Colonial Laws Validity Act. Can we go further and say that all objections to even the most extensive delegation by the Legislature to some authority subordinate to itself are deprived of their force and validity since every such Act, if not a good exercise of the ordinary legislative power, may claim validity as a law with respect to the constitution and powers of such Legislature? In other words every Act and every provision of an Act, by the fact that it is not within the general legislative power, is an Act respecting the constitution or powers of the Legislature, and valid under that head? In other words again, that every Act which otherwise would be in breach of the Constitution is by sec. 5 of the Colonial Laws Validity Act transformed into a valid Act as respecting the powers and constitution of the Legislature? This brings us to aspects of the powers of Colonial Legislatures considered in *McCawley* v. *The King*.[24]

[24] (1920), A. C. 691; (1918), C. L. R. 9.

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EVIDENCE BY DECLARATION.

A few weeks ago, by reason of a misunderstanding between the Crown Officers of Toronto and the authorities of the Toronto General Hospital, I was requested by the Attorney-General to preside over an informal but representative Committee to consider the proper practice in cases of apparent crime.

Inter alia it was agreed that it would be of advantage that a simple and practical statement as to "Dying Declarations," "Ante Mortem Statements" or "Evidentiary Declarations," should be prepared for the guidance of medical men generally and those in hospitals particularly.

I have prepared the following after conference with experienced Crown officers and medical men. I am, however, wholly responsible for the document.

WILLIAM RENWICK RIDDELL.

Osgoode Hall,
Toronto, April 21, 1922.

DECLARATIONS AS EVIDENCE.

The general rule of our law is that only what is said under the sanction of an oath (or of its legal equivalent) can be received as evidence. But for about two hundred years, the English law, which our law follows, has made an exception in what have been called "Dying Declarations," or "Ante Mortem Statements" —sometimes "Evidentiary Declarations."

GENERAL REMARKS.

When a judicial investigation is being made into the death of any person by homicide, statements made by that person respecting the circumstances resulting in his death, are admitted in evidence, if such statements are made by him when under the influence of a conviction that his death is impending.

Sometimes such evidence is of the very greatest importance, since frequently no third person was pres-

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ent. It is, of course, the duty of every good citizen to disclose crime and to preserve evidence of it. A medical man, therefore, attending a patient likely to die under circumstances indicating a crime by act of omission or commission which directly or indirectly caused his death, should endeavour to obtain such evidence from him as is available; and this sometimes is as useful to protect the innocent accused of crime as it (more frequently) is to convict the guilty.

This is not (as it is sometimes offensively put) to act the part of a detective, but to act the part of a good citizen, and it is called for only in cases of apparent homicide where there is reason to suspect that the condition of the patient is due directly or indirectly to crime, foul play or criminal negligence.

Speaking generally, it is always wise for the doctor as soon as he thinks that a case is hopeless, to inform the patient of the fact—he may have affairs to settle, a will to make, directions to give, etc.

Difficulties may sometimes arise as to which it is impossible to lay down any fixed rule—for example the patient may be of such a temperament that a statement of this kind would probably cause death sooner than it otherwise would occur, etc. Medical men are always conscious that (speaking generally) their first duty is to the patient, and that consequently nothing which can be reasonably and properly avoided should be done which is likely to harm the patient; and yet, exceptional cases may occur in which the private must give way to the public good. The medical man must face the situation if and when it arises and determine as his conscience and sense of public duty dictate. Cases of this kind are exceptional; and in no case should fanciful or captious objections be raised; in all cases of real difficulty, the Crown Attorney should be at once consulted.

RULES OF LAW.

To make a Declaration evidence, there must be in the mind of the patient an impression of impending death—if he believe that his case is hopeless, but that

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there will be a prolonged continuance of life, a Declaration is not admissible. There must be expectation, a hopeless expectation, of death near approaching. It is of no importance that the physician or any other than the patient, thinks he may or will recover—the important thing is the expectation of the patient. Nor is it of any importance how this expectation is induced, whether from the patient's own observation, statements of medical men or otherwise—the essential matter is its existence, however induced.

This expectation, impression and conviction that death is impending, may be manifested by the patient in any of several ways—he may say so in so many words or he may indicate his conviction of impending death by changing countenance and appearing distressed or terrified when he is informed of it, etc. He may do this without any words of apprehension; and still make his conviction clear.

It is of great importance for the ends of justice that the attending physician should not only make the state of the patient unmistakably clear to him, but also that he should, if possible, obtain unmistakable evidence that the patient was convinced and without hope.

DIRECTIONS FOR TAKING DECLARATIONS.

Where there is ample time, the Police and Crown authorities may be communicated with to take the Declaration; but no chances should be taken whereby the evidence may be lost.

The doctor should satisfy himself that the patient understand what is said to and by him.

The Declaration may be elicited by questions put to the patient.

Everything said by him in respect of the circumstances causing death should be noted, even if it may seem to be immaterial.

It is very desirable that the Declaration be reduced to writing; where circumstances permit, it should be read over to the patient; and if he is able, he should be

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got to sign it; witnesses present should also sign as witnesses. Magistrates sometimes examine a patient on oath and the examination is signed by both—this is permissible.

It is, however, not absolutely necessary that the Declaration be reduced to writing at all. If circumstances do not permit of a written Declaration, an oral Declaration should be obtained. In that case, all present should take full notes of what is said, so that the memory may be refreshed (if necessary) when evidence is to be given of the Declaration. (Such notes are, however, not evidence in themselves.)

If the Declaration be reduced to writing and circumstances prevent its being signed by the patient, the witnesses should sign it after making certain that it is accurate—the absence of the signature of witnesses is not fatal to the Declaration but such signature is always advisable.

PRACTICAL RULES.

1. A Declaration is admissible in evidence only concerning the circumstances resulting directly or indirectly in the death of the patient himself.
2. It must be made under the influence of a conviction in the mind of the patient that his death is impending.
3. It may be made to anyone.
4. The doctor should not imperil the obtaining of such Declarations by waiting for the Police or Crown authorities.
5. Where there is ample time it is well to communicate with Police and Crown authorities.
6. A Declaration may be obtained by questions; and when the statements of the patient are not full, it is often well to supplement them by information obtained in answer to questions.
7. Where possible the Declaration should be reduced to writing, read over to and signed by the patient—if it is also signed by witnesses, this is the ideal Declaration.

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8. But a written Declaration without signature is admissible,
9. And so is an oral Declaration.
10. In case of any difficulty at any stage, the Crown officers should be at once consulted.
11. In all cases of doubt, the Declaration should be taken, leaving it to the Court to determine its admissibility and value.
12. Crown and Police authorities generally prefer to take the Declaration by stenographers—these rules are, however, not intended for the guidance of such authorities—but for medical men or laymen who can seldom obtain stenographic assistance.

WILLIAM RENWICK RIDDELL.

Osgoode Hall,
Toronto, April 20, 1922.

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NOTABLE CASES NOTATED.

Public Authorities Protection—Action of Negligence—Limitation.

In *Edwards* v. *Metropolitan Water Board*[1] some nice points were raised with regard to the protection afforded by the Public Authorities Protection Act, an Imperial Statute, the provisions of which are incorporated in the Statutes of most of the Provinces of Canada in one form or another.

In the case under review the Defendants were under a statutory duty to supply water to the inhabitants of a certain area, and to maintain pipes for the purpose of conveying the water. Certain depots were established whereat were stored materials for repairing and extending the pipe lines. Lorries were used for the purpose of carrying materials to replenish the stores and to bring back empty receptacles which had contained stores. A lorry returning from a depot with empty casks ran over and injured the Plaintiff on September 17th, 1919, and on June 7th, 1920, the Plaintiff issued a Writ claiming damages. The Defence relied on sec. 1 of the Public Authorities Protection Act, which required the action to be commenced within six months, next after the act, neglect or default complained of.

The Plaintiff contended in effect that the return journey of the lorry was not made for the purpose of enabling the Defendant to perform its statutory duties, and therefore, the principle laid down in *Bradford Corporation* v. *Meyers*,[2] would apply, but the Court held that the return journey of the lorry was the same journey as the outward journey, and the two journeys could not be distinguished. The question then arose whether such a journey was undertaken directly in pursuance of the Defendant's public duty, since if it were not, it was contended on the authority of the Bradford Case, the protection of the Act could not be invoked, and

[1] 1922, 1 K. B. C. A., p. 291.
[2] 1916, 1 A. C. 242.

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earlier decisions, including the Bradford Case, were considered, contrasted and distinguished. The net result of them all was summed up by Smithson, L.J., in the following words: "It is not essential that an act should be done in discharge of duty in order to bring the doers within the protection of the Act of 1893. It is enough if it is done in exercise of a power or of an authority, provided it is to be exercised for the public benefit."

Setting Aside Judgment for Perjury—Pleading.

A nice point of pleading was raised and determined by the Appellate Division of the Supreme Court of Alberta in *MacDonald* v. *Pier*,[8] but the Judgment was characterized by a great diversity of opinion on the main and subsidiary points material to the Judgment.

The Plaintiff sought to set aside a Judgment obtained by the Defendant against him in a former action on the ground that it was obtained by perjured evidence, and pleaded in his Statement of Claim that certain evidence was false to the knowledge of the Defendant, and misled the Court so that Judgment was given in his favour, but did not plead that new evidence showing that the evidence in the first action was false, had been discovered since the first hearing.

It seems to have been admitted that if it is established that a Judgment has been obtained by fraud it can be set aside, provided the action to set it aside is brought before the same Court, and the facts necessary to sustain the new action are alleged, but it was argued for the defence the pleadings of the Plaintiff did not make the proper allegations to sustain the claim, and particularly that they did not allege that some new evidence had been discovered since the last action.

Stuart, J.S., exhaustively reviewed all the available authorities for the broad proposition that a Judgment obtained by fraud can be set aside, and came to the conclusion that they could all be reduced to two classes,

[8] 1922, 1 W. W. R. p. 1208.

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namely: Firstly, where by collusion of the parties the process of the Courts had been abused, and consequently the whole proceedings were a nullity, and secondly, where it is not sought to treat as a nullity what had passed, but to undo it judicially upon judicial grounds.

It was apparent that the case under review did not come within the first class and, after analyzing the cases coming within the second class, the learned Judge came to the conclusion that in none of these cases had the Plaintiff succeeded upon a mere allegation of perjury in oral testimony before the Court itself on a former trial in open Court, but it was essential that something more should be alleged. He then examined the cases where it was sought to upset a foreign judgment on the ground of fraud, and found that such cases were not analogous to the case under review, and the same principles did not apply.

In the conclusion Stuart, J.S., decided that the Plaintiff showed no cause of action unless he alleged that something new in the way of evidence had been discovered, and accordingly dismissed the appeal.

Scott, C.J., merely concurred in this judgment, whilst Beek, J.A., dissented, and held that the principles invoked in a defence to an action on a foreign judgment on the ground of fraud could be invoked in an action to set aside a domestic judgment, but agreed in a post scriptum that the Plaintiff should have alleged he was in a position to prove perjury in the first action, though it was not necessary to allege that such proof was not available in the first action; he further held, however, that the defect caused by failing to make such allegation was cured by the production of the file relating to the first action, and that the Trial Judge in the second action should have given the Plaintiff an opportunity to adduce new evidence, if he had it, notwithstanding the absence of the allegation.

Clarke, J.A., who also dissented, was of opinion that the pleadings were sufficient since they alleged what in effect was a fraud on the Court, and this was an allega-

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tion of an extraneous fact, which was not before the Court in the previous action, and the vital issue to be determined in the second action was the fraud of the Defendant.

Hyndman, J.A., who joined in the majority judgment, held that the Court would entertain an action to set aside a judgment obtained by perjured evidence, but was of opinion that the allegations in the statement of claim were insufficient upon which to base the action, and that the claim should have set out the facts in the first case, and then the evidence it was alleged was false, so that the conclusion could be drawn that if the false evidence had not been adduced the first action would probably have resulted in the favour of the Plaintiff in the second action.

By a majority the action was dismissed.

Sale of Goods Act—Contract in Writing—Variation.

J. M. Levey & Co. v. *Goldberg*,[4] is another example of the reluctance of the Courts to construe too strictly the requirements of sec. 4 (Canadian sec. 6), of the Sale of Goods Act, if by a strict construction a Defendant is enabled to evade an obligation to pay which otherwise would be binding.

The Plaintiffs entered into a contract of sale with the Defendant, which by virtue of the above section was required to be in writing. Under this contract the Plaintiff was obligated to deliver to the Defendant certain goods not later than August, 1921, and the contract or a sufficient memorandum of the contract was in writing. At some date between August and September, 1921, before delivery had been made, there was a variation of the contract by mutual consent whereby the Plaintiffs were required to deliver at a later date. This variation was agreed upon verbally, and there was no memorandum in writing relating thereto.

The Defence maintained that the Plaintiffs were never willing and able to deliver in accordance with

[4] 38 T. L. R., p. 447.

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the original agreement, and that the arrangement arrived at in August was in substance a new agreement or a variation of the old agreement, so that in accordance with the well-known principle laid down in *Morris* v. *Barron & Co.*,[5] the Plaintiffs could not sue either upon the original contract, which by implication had been rescinded, nor upon the varied contract which was not in writing. It was held that the arrangement arrived at in August amounted to nothing more than a voluntary waiver by the defendant of a condition of the contract which was acquiesced in by the Plaintiff, and thus came within the principle enunciated in *Hinckman* v. *Haynes*.[6]

It might be noticed that the Plaintiff had not made any delivery to the Defendant, although required to do so between April and August, and it was after the time for delivery that the verbal variation was finally arrived at, so that the facts would more nearly approximate to the facts in *Plevins* v. *Downing*.[7]

The border line between the two classes is somewhat nebulous, and it is hard to lay down a general principle which would not be contradicted by some of the cases which nominally followed one of the two principal cases, but the modern tendency appears to be in all cases under sec. 4 (see 6), to avoid as far as possible a strict construction of the requirements of the section.

THE FOLLOWING ARE SUPREME COURT CASES NOT YET REPORTED.

ATTORNEY-GENERAL FOR B. C. v. BROOKS.

Constitutional law—License to cut timber—Condition not to employ Chinese or Japanese—Validity—Injunction.

The respondents were the assignees of a timber license issued by the Deputy Minister of Lands of British Columbia, in which was inserted the following provision: "This license is issued and accepted upon the understanding that no Chinese or Japanese

[5] 1918, A. C. 1; 87 L. J. K. B. 145.
[6] L. R. 10 C. P. 598.
[7] 1 C. P. D. 220.

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shall be employed in connection therewith." The respondents applied to the Courts for an injunction restraining the appellants from attempting to enforce such a provision, on the ground that the Statute enabling the department to insert it in the license was *ultra vires*.

Held, that the injunction could not be granted.

Per Davies, C.J., and Anglin and Mignault, JJ.—The respondents have no ground for complaint; if the condition is good, they have no grievance; if it is bad, the license itself is void and the respondents have, therefore, no status as lessees.

Per Idington, J.—The legislation of the province is *intra vires*.

Per Duff, J.—According to section 50 of the "Land Act" and to section 57, s.s. 3*a*, as amended by ch. 28, sec. 6 of the B. C. Statutes of 1910, the Minister of Lands had no authority to renew the license in February, 1921, unless performance of the condition precedent (above quoted) had been waived; it is clear that performance of the condition during the year ending in February, 1922, had not been waived; thus the respondents' license had already lapsed or must lapse on the 11th of February, 1922, and accordingly the respondents' application must fail.

Appeal allowed without costs.

RE LEGISLATION PROHIBITING EMPLOYMENT OF ALIENS.

Exclusion of Japanese and Chinese—Imperial Treaty with Japan—"B. N. A. Act" (1867), secs. 91 and 92.

The Legislature of British Columbia passed an Act in 1921 (11 Geo. V. ch. 49) purporting to "validate and confirm (an) Order in Council" which provided that "in all contracts, leases and concessions of whatsoever kind entered into, issued or made by the Government, or on behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith."

Held, that the Legislature of British Columbia had not the authority to enact this legislation. Idington. J., *contra*, and Brodeur, J., *contra*, as to the part relating to Chinese.

Per Davies, C.J., and Anglin and Mignault, JJ.—This legislation is *ultra vires* the Provincial Legislature, as it establishes a statutory prohibition which is within the exclusive authority of the Dominion Parliament conferred by sec. 91, s.s. 25 of the B. N. A. Act, in regard to "naturalization and aliens": *Union Colliery Co.* v. *Bryden* ([1899] A. C. 580), followed.

Per Idington, J.—Under section 109 of the B. N. A. Act, made applicable to the Province of British Columbia when brought into the Dominion, it was enacted that "all lands, mines, minerals and royalties belonging to the provinces" shall remain the property of these provinces; the mode of administration of any of these properties by the province is subject to the will of the legislature as the administration of a private property to the will of its

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owner; and as a private owner would have the right to stipulate in a contract the same conditions as those contained in the above Statute, this legislation is *intra vires* of the province.

Per Duff, J.—The provincial Statute would be *intra vires* of the Provincial Legislature as it is enacted in the exercise of its control over its public assets, and of its power of appropriation which is equivalent to property; and sections 102 to 126 of the B. N. A. Act exclude from Dominion control any power of appropriation over the subjects assigned to the provinces; but, as part of this legislation is repugnant to the "Japanese Treaty Act" and as the whole provincial statute views Japanese and Chinese as constituting a single group, it must be treated as inoperative *in toto*, since it cannot take effect according to its term.
Bryden's Case (*supra cit.*), distinguished.

Per Brodeur, J.—In its legislation, the Legislature of British Columbia deals with its own Crown lands and enacts that a certain class of persons, whether British subjects or not, will not be permitted, by reason of racial descent, to work on those lands; this is a question of internal management which, according to ch. 92, s.s. 5 of the B. N. A. Act, is within the competence of the local authority.

The Japanese Treaty, made in 1911, between England and Japan, was "sanctioned and declared to have the force of law in Canada" by a Dominion Statute enacted under the powers conferred by sec. 132 of the B. N. A. Act (3 & 4 Geo. V. ch. 27). Paragraph 3 of article 1 of the treaty states that the subjects of the high contracting parties "shall in all that relates to the pursuit of their industries, callings, professions, and educational studies be placed in all respects on the same footing as the subjects of citizens of the most favoured nation."

Per Davies, C.J., and Duff and Brodeur, JJ.—The Provincial Statutes of 1921, as to its part relating to Japanese, is *ultra vires* of the legislature of the province as being in conflict with the Japanese Treaty. Idington, J., *contra*.

DOMINION BANK v. MARSHALL.

Sale of land—Public auction—Mistake.

The receiver of the C. P. Lumber Co. was, by order of the Court, authorized to borrow from the appellant bank a certain sum which should be a first charge on the whole assets of the company; and the order provided for a sale of these assets in default of repayment. Such default having occurred, the bank sold the property to the investment company appellant by public auction, the conduct of the sale being in the hands of the bank's solicitor under the supervision of the Court. Owing to the solicitor being under the impression that a certain parcel of land did not belong to the Lumber Company, it was omitted from the particulars of sale. The solicitor for the receiver and the bank approved the particulars in the belief that they covered the omitted parcel; and the purchasers bought under the same erroneous belief. One

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condition of the sale provided that "any error of description . . . shall not annul the sale nor shall any compensation be allowed in respect thereof." There was evidence that the omitted parcel had a very substantial value; but no evidence had been adduced that a greater price might have been obtained for the assets, if the omitted parcel had been included. Upon the discovery of the mistake, the appellants applied for an order by the Court that the receiver execute and deliver to the purchaser a conveyance of the said parcel omitted in the particulars of the sale; and this application was resisted by the respondent acting as trustee for the bondholders of the Lumber Company.

Held, that the appellants' application should not be granted, and although the purchaser may have been entitled to rescission of the sale on the ground of mistake, the order prayed for could not be issued, as the appellants have failed to show anything which would raise an equity against the bondholders such as might have enabled the Court to direct that the deficiency in the land should be made good by the receiver at the bondholders' expense.

Judgment of the Court of Appeal ([1921], 3 W. W. R. 209) affirmed. Appeal dismissed with costs.

OUR LONDON LETTER.

Satisfaction at the appointment of Sir Gordon Hewart as Lord Chief Justice has been tempered by criticism of the manner in which the Government has dealt with the office. Lawyers will, however, be gratified that that criticism is confined to the politicians and is not in any way directed against the Bench or Bar of England. "The uprightness and purity of the English Bench"—to adopt the words of the new Attorney-General—"is known in every home in the country." It is a tradition which for centuries has been scrupulously and proudly maintained by every holder of judicial office. Lay historians have at times charged judges with favouritism, but in this they have usually reflected ill-informed prejudice current in the period of which they write. *The Case of Ship Money* (3 State Trials, 825) is an unusually striking example. Judicial subservience to the Stuarts is represented by most political historians as one of the evils against which the Roundheads fought, and Hampden's unsuc-

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cessful lawsuit is painted as a crying scandal. No lawyer, however, needs to be reminded that the judges were acutely divided, five of the twelve deciding in Hampden's favour. Moreover, present-day opinion would approve of the law as laid down by the majority and indeed in *The Attorney-General* v. *De Keyser's Royal Hotel, Ltd.*, [1920] A. C. 508; 89 L. J. (Ch.) 417, the decision in *The Case of Ship Money* was relied upon, in these days of triumphant democracy, by the subject against the Crown. Clearly the Stuart judges were not as subservient as is too often suggested; and the integrity and independence of the Bench in the present day is surpassed in no country.

The tradition has been rigidly respected by politicians. Political considerations have undoubtedly entered into the selection of judges, and the Lord Chancellor is a cabinet minister. The chief judicial positions, moreover, usually fall to the Law Officers, but as a rule their interests and ambitions are legal rather than political. Sir Rufus Isaacs, as Lord Reading then was, was the first Attorney-General to be a cabinet minister, and he was such not in virtue of his office, but by reason of his peculiar political sagacity. But, in any case, on appointment to the Bench an English judge invariably upholds the enviable tradition established by generations of predecessors, and as a rule politicians studiously avoid any act which could possibly prejudice that tradition. Unfortunately Mr. Lloyd George has allowed political exigencies to affect the highest permanent judicial office in England.

In January, 1921, Lord Reading was preparing to go to India and ceased to act as Lord Chief. The congested state of the lists and other considerations made it desirable that a successor should be at once appointed. By custom the office would have been offered to the Attorney-General, Sir Gordon Hewart. No member of the Bar was more fitted for the office, and it was well known that his ambitions were judicial. The Prime Minister, however, had found Sir Gordon

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Hewart a very valuable political asset, not least on account of his tact and skill on the floor of the House. The Prime Minister accordingly tried to persuade Sir Gordon to stick to politics, and refrained from offering him the Lord Chief Justiceship. Lord Reading's resignation was delayed as long as possible, but in April the Prime Minister devised a scheme which enabled him to retain Sir Gordon's help in Parliament, while not depriving him of his one chance of the highest judicial post, apart from the Lord Chancellorship, which a barrister can gain.

Mr. Lloyd George offered the position to Mr. Justice A. T. Lawrence, who had been on the Bench for more than sixteen years and, being seventy-eight years of age, was known to be contemplating retirement. The office of Lord Chief Justice was a fitting crown to his distinguished career. He had been an excellent judge, and his courtesy and patience had made him very popular with the Bar. On personal grounds there was much pleasure at his appointment. The appointment, indeed, would have been acclaimed, but for suspicion of the Prime Minister's motives.

Mr. Justice Lawrence made an able Lord Chief Justice, but his health did not allow him to continue long in office. On November 1st, 1921, after filling the position for a few months only, Lord Trevethin (as he had become) resigned, and the Prime Minister found himself again in the dilemma created by Lord Reading's going to India. Once more his conduct was guided solely by political motives. As on the previous occasion, he persuaded the Lord Chief Justice to postpone his resignation. In January, however, Lord Trevethin asked that it might take effect. At the urgent request of the Prime Minister, he nevertheless again postponed it. Meanwhile, however, the Government's position had greatly weakened. Seats were falling in the bye-elections, and a serious Conservative revolt from the coalition was threatened. It was clear that Lord Trevethin would not indefinitely postpone his retirement, and equally clear that if he resigned

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his successor would be Sir Gordon Hewart. Sir Gordon Hewart was obviously the proper man for the position and would certainly not in the changed circumstances sacrifice his legitimate judicial aspirations to suit the convenience of a tottering Government. Having at last resigned himself to the loss of Sir Gordon Hewart, the Prime Minister acted with unseemly haste.

Lord Trevethin was sitting at the time on the special jury list and had before him two cases arising from the same facts. Mr. Silver, of Silver Bros. Ltd., the Montreal wholesale furriers, had had a preposterous charge made against him. He had been accused of making a fraudulent insurance claim, but during the cross-examination of the prosecution's chief witness the jury had stopped the case. The underwriters of the insurance policy, however, still resisted the claim, and Mr. Silver brought two actions against them. One was for the insurance money, the other for damages for malicious prosecution. By special order they were put in the list one after the other, in order that if desirable the same judge and jury might try both. In the middle of the first case Lord Trevethin learned —rumour suggested from the newspapers—that his resignation had been accepted. At any rate it was immediately publicly announced. Lord Trevethin finished the first case on the following morning, but "felt himself in a difficulty about beginning" the second. The second (which like the first was eventually settled in Mr. Silver's favour) accordingly went over to another judge and jury. The incident shows, however, how little the interests of justice were considered by the politicians. Through Mr. Chamberlain the Prime Minister and the Government apologised in the House of Commons for the regrettable lack of consideration thus shown to Lord Trevethin, but the incident should never have occurred.

The new Lord Chief Justice gives promise of being one of the greatest among the holders of his office, illustrious though many of the names on the list be. It is only twenty years ago that he was called to the

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bar. As an advocate he had few equals. Sir Edward Carson, Sir Henry Duke, formerly Irish Secretary and now President of the Probate Divorce and Admiralty Division of the High Court, and Sir John Simon, who at the phenomenally young age of forty refused the Lord Chancellorship for the sake of his political ambitions, are probably the only barristers among his contemporaries who rivalled Sir Gordon Hewart. The terrible sincerity of Carson which gradually impressed itself on a jury was probably the greatest guarantee of success that a litigant could have. Hewart gave the same impression of sincerity, though not quite to the same degree. But he also had Duke's plausibility, by which even weaknesses in a client's case were so naturally explained as to confirm and strengthen his position. Hewart's mind was as agile and brilliant as Simon's, and his speech and manner as polished and graceful. Moreover, in all legal matters he gave an impression of soundness, of having an intuitive grasp of legal principles, which never failed him. Yet he was 32 years of age before he was called to the bar, for like Duke he had been in the reporters' gallery of the House of Commons before taking to the law. His legal career was one of meteoric success. In no small measure this was due to his lucidity and simplicity in presenting complicated facts, and to his skill in handling witnesses. It would be untrue to say he was a great cross-examiner, but in the far more difficult task of examining in chief he habitually displayed astounding skill. At the zenith of his career at the bar he became a Law Officer, and now at the early age of 52 he has attained the highest purely legal position in the land. His tenure of office should be long, and unless all the omens are wrong, will prove unusually distinguished.

Of the new Law Officers there is little to say. Sir Ernest Pollock, a member of the famous legal family, is patient and hard working. He is capable and sound, but neither as an advocate nor as a lawyer has he the outstanding ability of his predecessor. Mr. Leslie Scott made his reputation in Liverpool, and Lord

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Birkenhead was one of his pupils. As an advocate he has an impressive manner, but is thorough rather than brilliant. He has, however, a well-deserved international reputation as an authority on maritime law, and more than once has represented England with distinction on international conventions.

Mr. Justice Greer has recently restated, with admirable clearness and some illuminating criticisms, the rule in *Braithwaite* v. *The Foreign Hardwood Company,* [1905] 2 K. B. 543. He carefully considered its underlying principle in *Taylor* v. *Oakes, Roncorini & Co.* (1922), 38 Times Law Reports, 349. The rule was originally established by the able argument of Scrutton, K.C., and Atkin, who now commonly sit in the same court as Lord Justices of Appeal. In commercial communities cases are constantly arising where the principle is applicable, but too often it is overlooked by counsel, and the well-known case of *Avery* v. *Bowden* (1855), 6 Ellis & Blackburn 953, is assumed to govern facts where properly it has no application. *Avery* v. *Bowden* establishes that if a contract is repudiated and the repudiation is not accepted, the contract remains open for the benefit of both parties. Braithwaite's case, however, lays it down that such a repudiation is a waiver of all conditions precedent and, if persisted in, the repudiating party cannot avail himself of anything inconsistent with the contract which the other party does between the original repudiation and the time when, persisted in, it is accepted. This is a modification of the *Avery* v. *Bowden* rule of great practical importance. If, however, the repudiation is retracted, the repudiating party resumes his full rights under the contract. The original Braithwaite judgments should be read in conjunction with Mr. Justice Greer's discussion of them.

Fifteen barristers have just been appointed King's Counsel. "Taking silk" is not the formal matter in England that it is in Canada. A few of the appointments are usually political honours, a few more are bestowed on barristers who, having got to an age when they wish to retire, are gratified with the dignity of a

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silk gown as a fitting conclusion to their careers. The flourishing junior, however, whose years are not far spent, must consider well before becoming a leader. A King's Counsel cannot take pupils, while a junior may make as much as £800 a year from pupils alone. A King's Counsel cannot draft pleadings. Worst blow of all, a King's Counsel cannot appear in court without a junior with him, and the junior by custom must receive a fee approximately two-thirds the size of his leader's. Thus a junior may be quite willing to conduct a case in court for a 15 guinea fee. His client, however, rather than take risks may wish to brief a "silk." If the latter's fee be 30 guineas the junior, relieved of work and responsibility, yet finds his fee increased to 20 guineas. If very eminent counsel is briefed the increase may be astounding. Many a man doing well as a junior, getting a multitude of small cases, has found that "taking silk" has ruined all his prospects. So the step is not one to be taken rashly. On the other hand, if it is ever to be taken, it must not be delayed too long if a large practice is aimed at. The happy men are those who are forced to take silk, who become so overwhelmingly busy that, to cut their work down to manageable proportions, they welcome the chance of discouraging the press of clients by a method which at the same time increases their fees. For the brilliant man flourishes as a K.C., while the mediocre gradually fades into obscurity.

Among the new King's Counsel are Mr. Topham, the writer on company law, Mr. Latter, whose book on contracts, in which he co-operated with Mr. Pease, is widely known, and Mr. Jowitt, who has a very large commercial practice. At the age of 36 Mr. Jowitt is the youngest King's Counsel, and, with the exception of Sir John Simon, who took silk at 35, he is the youngest man for many years to become a leader. Lord Birkenhead was called within the bar when the same age.

The ceremony of calling counsel within the bar is interesting. Arrayed in full-bottomed wigs, knee breeches, ruffles, silk gowns and white kid gloves, the

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chosen band proceed in a body from court to court, and in each the judge requests them to take their seat within the bar. With low bows to bench and bar they do so, only to retire immediately with more bows. Fortunately the garb donned on this momentous occasion is not the K.C.'s ordinary costume, though whenever he argues in the House of Lords he has the discomfort of the full-bottomed wig.

FRANK GAHAN.

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CONTRACTS WITH AGRICULTURAL CO-OPERATIVE ASSOCIATIONS IN SASKATCHEWAN.

The Court of Appeal in Saskatchewan has in *Gnaedinger* v. *Turtleford Grain Growers Co-operative Association, Limited*,[1] decided that where a wholesaler sells goods to one of these associations on credit he is not entitled to a judgment for the purchase price, but only to a judgment for the return of the goods so far as still in the possession of the association, together with a judgment for recovery of money had and received by the association for such of the goods as may have been sold.

These associations are incorporated under The Agricultural Co-operative Associations Act (R. S. S. 1920, c. 119),[2] section 5 of which places definite restrictions on their trading operations. The directors are expressly prohibited from pledging the credit of the association except for certain specified purposes, and it is made clear that they cannot pledge the credit of the association to wholesalers for goods purchased. "If, therefore," says Lamont, J.A., in the leading Judgment, "the directors enter into a contract for the purchase of goods which, by its terms, shows that the

[1] (1922) 1 W. W. R. 936.

[2] Since amended by Statutes of 1920, ch. 50, and Statutes of 1921-22, ch. 52.

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goods were to be paid for at some future time and not on delivery, such a contract, not being within the powers of the association, is invalid and cannot be enforced as a contract." He continues:—"The firms supplying the association with goods are presumed to know the law, and to know that the directors have no power to pledge the credit of the association, and that if they agree to sell on credit the Courts will not enforce the agreement or entertain an action for the purchase price. They are bound to satisfy themselves that the proposed dealing is not inconsistent with the Act."

It was held, however, that the goods were still the property of the wholesaler and should be returned to him, and the well-known case of *Sinclair* v. *Brougham*[3] was referred to. This, it will be recalled, was a case relating to the assets of the Birkbeck Permanent Benefit Building Society, which developed a banking business that was *ultra vires*. The questions which finally came before the House of Lords for decision were as regards the respective rights of the depositors and the members of the Society.

Reverting to the Saskatchewan case, the Court of Appeal further held that the Association must account to the wholesaler for the price of goods received from the wholesaler and sold to customers in the course of the Association's business.

This was the Judgment of the majority of the Court. Haultain, C.J.S., concurred in holding that the plaintiff was entitled to a return of the goods still in the possession of the defendant, but as regards the latter portion of the Judgment he stated as follows:—

"I do not agree that the plaintiffs can recover the price of the goods sold by the association indirectly by way of accounting unless the actual money received for them can be followed. To hold otherwise would seem to me to nullify the absolute prohibition of the Statute."

Ontario lawyers will be interested to note to what extent the Court of Appeal in Saskatchewan has found itself unable to agree with the opinion of the Ontario

[3] (1914), A. C. 398; 83 L. J. Ch. 465.

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Court in *Fitzgerald* v. *London Co-operative Assn.*,[4] a case turning upon the interpretation of a Statute similar to the Saskatchewan Statute in question in the *Gnaedinger* v. *Turtleford* case.

CORRESPONDENCE.

Musings About the Profession.

The Editor,
Canadian Law Times.

How completely English decisions dominate cases in Ontario may be seen by any one who chooses to consult the O. L. R. This is not to be wondered at, because the first thing counsel does, when he is preparing his case, is to look it up in Halsbury or in the latest English text book. Naturally the judges note the citations from these sources and so the decisions come. There is a great lack in Ontario of good Canadian text books, but that can hardly be remedied so long as the English ones are so excellent. Our attempts could not well refine the lily or adorn the rose. But there is a still greater reproach in the quality of our digests. The last two lack the precision and clarity of the English digests; their type, headings, and sub-divisions are not all that could be desired. They do not bear the stamp of the conscientious, well-informed and systematic lawyer. But the profession and its legal guardians, the Law Society, have always been singularly casual in offering any practical help in regard to case law. Beyond the noting up of cases in the General Osgoode Hall Library, practically nothing is done; and hence the ease of "finding your law" in English digests and text books diverts counsel from his own terrain, and the Bench as well, in Ontario law. As a consequence cases are decided, involving points already settled here, without any reference to that fact, or indeed knowledge of it.

[4] (1869), 27 U. C. Q. B. 605.

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This is rather a singular commentary on the hostile attitude of some towards Privy Council appeals: We are willing to take our law from English text books, but not from those who form the source and authority for what is in them.

Another obvious fact is that the profession are not students of law books, but rather practicers within the precincts of the law. No voluntary Society exists for the study of law, from pure love of its fascinations or from ambition to know all that it represents. There is not yet any strong desire to require that a Barrister shall have a University degree before being called, nor to make the Faculty of Law in the University of Toronto a real power either in informing and influencing student life, or in attracting, for a post-graduate course, those already newly engaged in their profession. Nor can it be said that the various Law journals, by whatever names they are called, either old established or modern in origin, meet with a welcome such as is accorded to their English contemporaries. One would suppose that a learned profession would instinctively offer its help to lighten the burden of the editors or revel in the unravelling of legal tangles. Even the lighter side, represented by "judicial amenities" or the "Wit and Wisdom of the Bar," find little real appreciation. The evening papers with their ludicrously inept appreciation of law and its working, are left to chronicle the doings of the Bar or the work of the Bench, while the flair of a unique and singularly interesting human institution is conspicuously absent.

Yours, etc.,

FRIEND OF C. L. T.

EDITOR'S NOTE.—The writer of this all-too-brief communication reflects a condition which we have often observed and more than once discussed.

Canada is big enough and sufficiently developed to display her individuality. She is past the period of make-shiftery. Her lawyers ought to display themselves not as novices but as masters, and they should encourage the production of first-class legal literature—text books, digests, legal journals like the CANADIAN LAW TIMES—by patronizing them.

Juristic writers, the salt of jurisprudence everywhere else, are contemned in Canada. Alas what a perversion and what a reflection!—B. T.

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The Canadian Law Times.

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EDITORIAL.

Canadian Bar Association—Annual Meeting.

Our Readers will pardon us for keeping before them the approaching Annual Meeting of the Canadian Bar Association.

At any time the prospect of a visit to the Pacific Coast is alluring, but with the added attraction of the Annual Meeting of the Canadian Bar, it ought to be compelling; and every Barrister throughout the Dominion ought, as far as he really is able, to respond to the invitation and be in Vancouver on the 16th of August next.

This is a big country, and we all seem to know one another too much from a distant horizon. The consequence is that we form wrong estimates of one another —of our professional equipment, our mentality and our character. Meeting together may dispel many illusions.

We are at all events Professional brethren. Then let us fraternize and not merely scan one another through the mists of thousands of intervening miles. Rally all to Vancouver early in August.

Besides the pleasure of the visit and the opportunities it will present of meeting leading lights of the Profession from the Old Country as well as the United States, there are many subjects of pressing importance to Canadian Barristers which are to be discussed, and we hope advanced towards the consummations aimed at by the various Commissioners to whom they

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have been delegated in the interim between last meeting and the approaching one.

There is, for instance, the subject of Uniformity: and we trust the Commissioners will have something tangible to put forward this year, especially on the Uniformity of Joint-Stock Company Law—some of the divergences and anachronisms of which in various Provinces we have been expounding for some months past.

The method of appointing our Judges is another theme upon which the Association should express an Opinion constraining in its unanimity. The Opinion may or may not, as prudence may suggest, be preceded by a protest against what has been done in recent cases. These cases are merely the last evidences of a system which has been perniciously followed by Dominion Governments for years. The effect is seen wherever one goes. It is a system that should have shamed itself beyond endurance long years ago. The Bar Association should see that it makes its exit now.

In early times there was, perhaps, some excuse for the idea of rewarding political henchmen with Judgeships. But Canada has passed beyond the stage of thinking that by calling a man a Judge you make him a Lawyer. The fact that many politicians after being made Judges eventually did become distinguished Lawyers and ideal dispensers of the finest conceptions of Equity, is no reason for the continuance of the system of appointing to the Bench men whose only qualification is political services. It is no reason; first because a man should have the qualification before he is appointed, and secondly because many political appointees have failed to develop the legal mind and on the Bench remain the splashers in Law that on the platform or in the caucus they had been in politics.

Justice cannot be dispensed in this way.

The wrong needs no elaboration here; and we look for emphatic action on the part of the Bar Association at its meeting in August.

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Another subject, akin to the last, might at the same time receive attention—the K.C. status. The dignity has been accorded—or withheld—with the same reckless disregard of merit or legal attainment as have the promotions to the Bench. Both should be dealt with together.

In our next issue we hope to be able to give a complete list of the distinguished Visitors from other Countries who will honour the Annual Meeting by their presence.

Canada's Status.

The Status of Canada as an entity of the British Empire has for some time caused considerable discussion, not only in this Country but in Great Britain.

The question is entirely one of the Constitution, and it cannot be solved by the jargon of politicians who agitate for the acquisition of everything with the glitter of new tinsel without reflecting on its intrinsic worth or on its possible onerousness.

One thing there is which the political agitators urgently demand—the amendment of the B. N. A. Act so as to confer upon the Parliament of Canada the power to alter the Constitution of Canada. The Provincial Legislatures, with certain limitations, have the power to alter the constitutions of the Provincial constituent entities of the Dominion; and it is argued that the Parliament of Canada should, with respect to the Dominion entity, have a corresponding power. *Non sequitur* we emphatically say.

Paradoxical though it may seem to say so, the power to alter the constitution of the Dominion in the way suggested concerns the Provincial entities rather than the Dominion; and no further power than it already possesses over our Constitution, should be, or can be, conferred on the Parliament of Canada without the emphatic and unanimous consent of the Provinces. That consent should be reflected in, and radiated from, the Provincial Legislative Assemblies and should not be inferred or collected from the clamour

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of those who are merely members of the Parliament of Canada. Above all, it should not be inferred or collected from the howl of a quasi-republican Press which confounds the conceptions of movement with those of progress.

The B. N. A. Act is the result of a compact between the United Kingdom and the original entities of the Confederate Union—Upper and Lower Canada, Nova Scotia, and New Brunswick. These old colonial entities created the Dominion and determined, for themselves, its power. The Imperial Parliament accepted and enacted what the entities had determined. Since then — 1867 — new entities have entered the Union whose territorial area far surpasses that of the old entities. They are all on a parity of power under the B. N. A. Act. From their union the Dominion derives its vitality, and it must subserve and not dominate them, otherwise it may imperil itself. With this conception the B. N. A. Act was wisely drawn, reposing much more of the attributes of Sovereignty in the constituent Provinces than in the United Body called the Dominion. One of these attributes is the power to alter the constitution. The Provinces possess it; the Dominion does not.

In the early years after the Union the struggle of the Dominion was for dominance, and the trend of the judicial interpretations of the Constitution by the Canadian Courts favoured the pretentious claim of the Dominion to supremacy over the Provinces. To some extent the Privy Council also encouraged it. That the direction of the interpretation was perilous was soon detected. The twisted vision was duly rectified, and for many years now the Provinces have been gaining in prestige and power at every new interpretation of the Constitution when Provincial were arrayed against Dominion rights. Now and then, no doubt, the draftsmen of Provincial taxing-enactments have lost their perspective and have blundered, through the fervor of over-zeal. But instances of this kind arising out of clumsily drawn Provincial statutes do

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not affect what I say with regard to the B. N. A. Act. Its interpretations by the Privy Council make it abundantly clear that the Province is in a greater degree a Sovereign Entity than is the Dominion. This is as the "Fathers of Confederation" designed. It is right thus.

The Provinces will do well to pause and ponder before they assent to the Dominion being invested with the power, through its Parliament, of amending the Constitution.

It is hard to conceive an amendment which would not effect for the Dominion an accession, and for the Provinces a curtailment, of power.

The inability of the Parliament of Canada to re-establish the Wheat Board is now put forward as an illustration of the need for amending the B. N. A. Act. The original Wheat Board was constituted as a War Measure, though very late in point of time, for controlling the Wheat of Canada in the interest of the Allies. While it endured it produced beneficial results to the Wheat-Grower in regard to prices; but even then there was a continuous growl that it was a pernicious measure as, it was said, it curbed the right of free-marketing which if it had been in full operation, would have yielded the Wheat-Grower still higher prices for his products.

The Constitution presents no difficulty—no insurmountable difficulty—to the establishment of a Wheat Board so long as the right remains with the Farmer to patronize it or not as he sees fit. Its compulsory element should consist of its advantages and attractions; but these advantages and attractions should not be fabricated out of an inflated artificial price which the Dominion Government would be obliged to pay the Wheat-Grower whether or not it realized that price in the World's markets. That really is the stumbling block.

It is not my concern to draw up a Wheat Board scheme. It would be easy to do so; and the Constitution needs no amendment for such a scheme.

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The Wheat Board at this time is only a pretext for the agitator to spur Canada unto the rocks of ruin in regard to the power of Parliament to amend the Constitution.

It would be fatal to invest the Parliament of Canada with any such power, if we are to judge of its action and conduct in relation to Rupert's Land and the North-West Territory. It availed itself of the Trust and tentative authority reposed in it, not under the Constitution at all, but under Rupert's Land Act, 1868, and under the Order in Council of 23rd of June, 1870, to establish an autocratic suzerainty over these two vast areas, and to despoil them of their lands and natural resources, though they were admitted into the Union as Members of it, and subject to the B. N. A. Act by the Imperial Government. That infamy continues to-day in spite of three years' continuous exposure of it in the C. L. T.; and if the Parliament of Canada had had the power of amending the Constitution, long since that infamy, though grossly in violation of the scheme of Confederation, would have been legalized. *Ab uno omnes.* Parliament has to remove this infamy and redress, as far as it can, the consequent wrong before the Provinces would be justified in consenting to its receiving any power or authority to amend the Constitution as embodied in the B. N. A. Act.

Legal Education.

Whether Legal Education should be controlled by the Law Faculties of our Provincial Universities or by Law Schools under the Provincial Law Societies, is a question which just now is causing some perturbation. Why should it do so? The two are quite distinct. They revolve in different orbits: both should be maintained; and attendance at both by students seeking admission to the Bar should be absolutely a *sine qua non.*

This may look hard to the multitude of aspirant lawyers who see the unfenced "pastures green" of the

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Legal Profession from the school grounds, and aim at entering them for foraging purposes and not because they lead to eminences beyond.

It is an ideal vision to the School Boy; and it is a vision on constant display by the School Teaching Fraternity whose own Members have so frequently entered the unfenced domain only to find the vision an illusion and the "pastures green" but arid areas which require long cultivation to render them productive. Very few indeed of the teaching fraternity who have entered the Law have succeeded.

Attendance, however, upon Law Lectures is to be made compulsory; and seeing that that is so I shall not here quarrel as to who the Lecturing authority is to be. It is at least a step forward in the right direction.

The Lectures in the Law Schools so far as I have come in contact with them in this country have been—to use the mildest language possible—very far short of what they should be. The Lecturers in the majority of instances had been promoted to the position of Deans and other euphoniously named offices for causes or reasons altogether extraneous to ability or legal merit. It was enough that they were favorites of the Benchers when the appointments were open. What a poor qualification for a Lecturer in Law! How can a man impart what he does not know? And to know Law sufficiently well to Lecture upon it, a man must first have studied it historically and then have restudied it critically. Besides that, he must have the didactic art. To learn by rote and prattle off the sayings of others mechanically makes a poor pretext for the splendid work of expounding what is at least a really complex subject.

What about the Professors in our Universities who are to be entrusted with the work of imparting to Law Students the fundamentals of their future Profession? By how much do they transcend or surpass the men who have been Lecturing in our Law Schools?

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Well I will not prejudge them. I will wait and see. But speaking generally we all too often find the Professor in the University is but at best a development of the *genus* School Teacher. Often it is doubtful whether he is a development at all. He is not necessarily so merely because of the higher and wider sphere of his operations; and in many cases he is not developed beyond the greater capacity of his wallet bag of accumulated miscellanies.

Occasionally he does develop sufficiently to pass beyond the atomic stage of knowledge to the period when by co-ordinating and cohering atoms he produces something crystalline. From that he may expand; and by repeating in different relations his success he may become a great exponent of real truth.

Applying these general reflections to the Law Professor who, without practising Law at all, merely attains his position by adherence to the teaching cult, we all too frequently find that he remains where he began — an accumulator of second-hand axioms and truisms which he fails to apply in any solutions other than those where he found them. He teaches law as he learned it in text-books and, being devoid of practical experience, he cannot even at the best, present it in any other setting or in any other way. He fails to crystallize atoms into principles, and he leaves the mind of his auditors surfeited with unassimilable details of the controversies in settled and decided cases. For three consecutive Lectures I once heard one of these men expound the case of *Derry* v. *Peake*. In modern times no case has perhaps created such division of really high expert opinion; for it involves a question quite as much of metaphysics as of Law. At the end of the third lecture I had a personal talk with the Professor and, stating an imaginary case, I asked him how he would apply to it the principles he had been expounding. Oh, he replied: that would be a question for a Lawyer. I was not then practising Law myself and attended these Lectures in a spirit of yielding to a craving to return to the field I had for

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years abandoned. I was, however, very much in the position of a student; and these Lectures puzzled and perplexed me until I turned to the reports of the famous case as decided by the Court of Appeal, 57 L. J. Ch. 347, and by the House of Lords, 14 App. Cas. 337; 58 L. J. Ch. 864. Then all was clear except what the Professor had tried to impart as to the point of divergence between the English and American decisions on the question involved—deceit and misrepresentation. Here, again, for quieting and clearing my mind I had to seek the American authorities, and especially an Article by Professor Williston, published in *Harvard Law Review,* vol. xxiv., p. 415. After this I had occasion to call upon the Professor whose Lectures so confounded me, and, reverting to his expositions of *Derry* v. *Peake,* I began to discuss the subject anew and from the American viewpoint. To my surprise, he declared he had never read the famous Article of Professor Williston, which has frequently been mentioned even in English decisions. Then I asked him about the American decisions whose effect Professor Williston had so ably demonstrated. He said he never read them or the American Law Magazines, but confined himself to the English Writers. It was from their comments, it appeared, that he had collected all the knowledge he possessed of the divergent American viewpoint upon which he himself had expatiated.

The American Courts, I may say, adopted the viewpoint of the English Court of Appeal as against that of the reversing decision of the House of Lords; and even the English Courts, since then, by distinguishing case from case, as opportunity presented, have, without actually touching the House of Lords' decision, honeycombed all round it, thus rendering relief which that decision would itself have precluded had it not been confined to a very definite and strict sphere for its operation.

If the Universities are to entirely dominate Legal Education they have a formidable task; and first of all they have to provide Lecturers on Law totally different

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from the type I have depicted. They have to provide men of legal ability and didactic skill, as well as men of character, whose personality will transmit itself magnetically and generate the high aims, noble ambitions, and worthy ideals which properly appertain to the Bar of every progressive country.

Another Divorce Illusion.

It is not, it seems, enough to scotch a snake. It must be killed outright, otherwise it is more than likely to recover though it may wiggle off to another locality.

In 1919 the Privy Council in the cases of *Walker* v. *Walker* and *Board* v. *Board,* put an end to the illusion that the Western Prairie Provinces had, like Ontario, no Divorce Law, and that their only source of relief in matrimonial affairs was through the Senate and House of Commons at Ottawa. I remember in 1917 when I advanced the contrary view that these Western Provinces had had the English Divorce Law for well-nigh 40 years under enactments of the Parliament of Canada, I was met not merely with sceptical attitudes but with peeved rancidity and derisive jibes. First the Appeal Courts of Manitoba and Alberta and next the Privy Council upheld my contention; but they did not make my path easy for all that.

One would have thought this great legal triumph would have killed the snake outright. It seems it was only scotched, for in the Canadian Law List for 1922 in a Synopsis of the Laws of Saskatchewan by Mr. J. A. M. Patrick, K.C., I find it stated under a section entitled Divorce and Matrimonial Causes, "the Senate and House of Commons can still be appealed to by any citizen who desires a Private Bill."

On seeing this, I wrote Mr. Patrick asking what was his authority for the statement. He replied that it is "the generally accepted opinion of the Profession in this Province." It is, in fact, a remnant of the old "generally accepted opinion" of all the Western Provinces that they had no Divorce Law at all, and

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that the Senate was the only relief forum. It is certainly not an authority for any legal problem; and if I had accepted it as an authority in 1917 on coming to the West the three Prairie Provinces would still be wallowing in the mire.

It is clear that the Matrimonial Causes Act, 1857, cancelled all prior jurisdictions over Divorce, and revested them in the Sovereign. Then it made in Statutory form a Law of Divorce, and delegated the complete jurisdiction over it to the Divorce Court thereby established. The Prairie Provinces, as well as B.C., have that Law, and their Courts have that jurisdiction; and so long as relief can be obtained in that way there is no right of resort to the Senate and House of Commons. Besides that, Mr. Patrick takes no cognizance of the fact that the Senate and House of Commons have, as I have shown over and over again in the C. L. T., no constitutional right or authority to do what they have been doing in regard to dissolving the Civil Contracts of husbands and wives. I have a large consensus of opinion that the system is a sham.

Parliamentary Divorce as carried out in Canada is, besides a multitude of other illegalities which I have fully revealed, a direct contravention of one of our oldest and most cherished constitutional safeguards—the Magna Charta; and to see an upholder of the vile system in a Province so recently disenchanted of its own illusions is truly pathetic and forces the question: *Quo animo?*

Contributory Negligence.

On this complex subject Mr. M. J. Gorman, K.C., Ottawa, has favoured us with a Contribution which we are pleased to publish in this issue. It was prompted by an Article of the Right Hon. Lord Justice O'Connor of the Appeal Court in Ireland, published in the January issue of the English *Law Quarterly Review,* though Mr. Gorman himself had so far back as 1917 written a prior Article on the subject, which was published in the CANADIAN LAW TIMES.

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This prior article had, like many other valuable contributions to legal literature, been "dropped behind," as we sometimes express the evasive or procrastinating actions of legislative authorities in regard to really great law reforms.

Mr. Gorman is in good company when discussing this subject with Lord Justice O'Connor; and it will be an intellectual feast to read side by side the articles of both.

For the rectification of the present complexities Lord Justice O'Connor looks to a masterly review-decision of the House of Lords, with a complete enunciation of the principles upon which the question of contributory negligence is to be determined; while Mr. Gorman advocates such an enunciation through the medium of Legislation.

If such Legislation is attempted, we do trust and urge that it may not be bungled by being left to the usual Parliamentary draughtsmen, but that the Government of whatever Province essays it, will delegate the drafting of the necessary measure to two or three men who have studied the subject; who understand the complexities clearly, and who can express in precise language the principles on which the Courts in future are to act.

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OWNERSHIP OF WESTERN LANDS.

The Aftermath of Restitution.

By Bram Thompson, M.A., Regina.

We cannot stand: we must advance,
Oh see the champing War-steeds prance.

I. The Great Crux.

The Privy Council's views expressed in the *Great West Saddlery Case* and set out in the April issue of the Canadian Law Times removed all pusillanimous Provincial uncertainty; and even Mr. Wallace Nesbitt, K.C., and Mr. Wegenast, K.C., who on the occasion referred to stated to the Privy Council that the question of the Ownership of the Land and Natural Resources is the greatest Constitutional issue at the present day between the Dominion and the Provinces of Manitoba, Saskatchewan and Alberta, would I think admit that it has ceased to be a Constitutional issue since the Privy Council's pronouncement, and it is now only a question of rectification and restitution. From the beginning the Dominion was a usurper. It turned, or tried to turn a trust obligation undertaken by, and reposed in, the Parliament of Canada into an Ownership. This design was first manifested in the Dominion Land Act, 1872; and ever since with growing effrontery or audacity the Dominion Government has asserted an unconstitutional Suzerainty over the entire West. The Acts establishing Manitoba, Saskatchewan and Alberta are rank with the fulsome odour of the autocrat and usurper; and they exhale it when they pretend to "grant" to these new Provinces their powers which are in truth their inalienable heritage under the B. N. A. Act, and above all when they pretend to deplete those inherent powers by nullifying the provision of Section 92 of the B. N. A. Act giving the Provincial legislatures the exclusive

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right to make Laws for the Sale and Management of their lands.

There was never any authority in the Parliament of Canada to "grant" powers to Provinces any more than there was to "grant" them land. All it could do was to carve out an area and, after giving it a name, dub it a Province. On doing this, the B. N. A. Act *ipso facto* imparted or transmitted to, or infused into, the new Provincial area its status within the Federation; its dominium over its land; and its powers and rights. And no enactment of the Parliament of Canada could curtail, alter or vary these adherent incidents of the Province.

For this view we have contended for three years against a mass of contrary opinion, or else against a mass of lackadaisical apathy and ignorance which shifted with the winds of political expediency but never towards the truth. To that both the Dominion and the Provinces were blind.

Now they see and this condition of affairs is over.

The Privy Council's views are on record and must in future be our guide; and as a first consequence Parliament itself has, with a clumsy shuffle, glided from its self-constituted Suzeraintyship to which it held tenaciously for over 50 years, and now offers to hand over whatever remains of the long-usurped land of the West. It is the beneficence of the thief of a man's purse who, after squandering its gold, offers to return the petty article with the silver and copper which it had contained when first he possessed himself of it. *Timeo danaos et dona ferentes.*

There is something more to be done, however, by the dethroned Autocrat. It cannot merely drop the remaining swag and pass on its way rejoicing and unscathed. It is faced with this:

(1) Neither the Dominion Government nor the Parliament of Canada had any ownership of, or authority or control over, the lands of the West under the B. N. A. Act; and the only authority the Parlia-

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ment of Canada had over them was a legislative authority in a Trust Capacity as a substitute Legislature for the North West Territories conferred by Rupert's Land Act, 1868, and by the Sovereign's Order in Council of 23rd of June, 1870.

(2) This Legislative Trust Capacity of Parliament over the West was confined to establishing local institutions analogous to those in the Provinces existent prior to 1870 and in the meantime to making laws for peace, welfare and good Government. So far as Manitoba was concerned this authority never came into operation as the Province—that is the old Postage Stamp—was carved out and established simultaneously with the entry into the Union of Rupert's Land and the North West Territory. So far as the rest of these areas was concerned, including the areas subsequently added to the original Province of Manitoba, the authority ended not when the Provinces were established in 1905 but when a Legislature for the N. W. Territories was first set upon an elective basis with a Lieutenant-Governor representing the Sovereignty of the King. There was never any power or authority in the Parliament of Canada to set up, as it did, a subordinate legislature. All it could do was to establish an institution analogous to what existed in the existing Provinces; and such an institution was the N. W. Territories Legislature. Any tags of subordination attached to it were *ultra vires,* and, in contemplation of Law, this Legislature ended the Legislative Trust Capacity of the Parliament of Canada over all the Lands of the West outside old Manitoba.

(3) Every Letters-Patent Grant of lands made by the Dominion whether under the Dominion Land Act or otherwise subsequent to the termination of the Legislative Trust Capacity of the Parliament of Canada is null and void—*nullitas nullitatum.*

(4) The Parliament of Canada could in its Legislative Trust Capacity, while it endured, have enacted a Law giving to the Dominion Government an authority or right to sell, settle and manage the lands of the

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West; and if the Dominion Land Act, 1872, was enacted in that capacity, grants under it of land such as homesteads, pre-emptions, etc., up till the time of the termination of the authority of the Dominion, would be valid. If the Dominion Land Act was not enacted in that capacity it is itself *ultra vires* and all grants of land under it are null and void. It is in fact so enacted, as I have all along contended since 1919.

(5) Except under a Law enacted by the Parliament of Canada in its Legislative Trust Capacity there was at no time any authority or power reposed in the Dominion or the Dominion Government to alienate or grant the lands of the West either under Letters Patent or otherwise. No such law was ever enacted.

(6) The lands granted to the C. P. R. and other Railways were granted either without authority at all and on the assumption that the Dominion owned the West, or else were granted under Railway Statutes enacted by the Parliament of Canada in its legislative capacity over Railways under the B. N. A. Act. In this capacity Parliament could not alienate, or contract to alienate, the lands of the West any more than it could the lands of Ontario or Quebec. If it required for a Railway a subsidy in land, it had to get the grant from the Provincial Legislature just as it did get the Railway Belt in B. C. for the purpose of the C. P. R.; and if a subsidy in land was required from the West the Parliament of Canada in its legislative Trust Capacity had to make the alienation. No such alienation was ever made and the Letters Patent Grants made to the C. P. R. and other Railway Companies of Western Lands are utterly null and void.

(7) The lands granted by the Dominion to Speculators and speculating Syndicates and Corporations who swarm like locusts all over the West have been granted on the baseless assumption that the Dominion owned the West and without any pretence of authority, legislative or otherwise; and Letters Patent Grants of such lands are utterly null and void.

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(8) Neither the Railway Companies nor other Grantees who have got land in the way stated from the Dominion Government have any title to the lands. Nor has any man to-day a good derivative title from them even if he is a purchaser for value.

These were debatable problems before the Privy Council spoke out, but since then they have been transformed into axioms of the Constitutional position of the Provinces, in regard to their lands.

We must face them, and so must the Dominion, and so must the Grantees from the Dominion and their Alienees of the lands of the West.

II. Solution.

It is not, I admit, enough to state the terrible imbroglio which purblind persistence in wrong has produced for all parties. The only feasible solvent, however, which suggests itself to me, so far, is the following:

(1) All Letters Patent Grants of land to Homesteaders, Pre-emptors and others who have actually settled on the land, both before and since the authority of the Dominion Government to make such Grants terminated, should be validated by Provincial Legislation so as to confer on the original Grantees or on those derivating through them, indefeasible titles.

(2) All the lands still held by the Railway Companies and other Grantees from the Dominion under unconstitutional Grants are, and should be, recognized as the Property of the Provinces within whose boundaries they lie. There is no use retarding development any longer by political bickerings or prevaricating legislation. Right is Right; and let it be done by terminating the wrong voluntarily, without driving the Provinces to assert their title as they may do in a variety of ways but at tremendous delay and cost to the Public.

(3) So far as these lands have been alienated by the original Grantees for value, the title of the Alienees

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should be validated by the Provincial Governments through Statutory enactments of the Legislatures, but all outstanding purchase-money payments should be made to the Provinces; and the Dominion should pay to the Provinces a sum equivalent to the amount already paid to the original Grantees by Purchasers from them of these lands.

(4) So far as these lands are still in the hands of the original Grantees, the title to them may at the option of the Grantees be similarly validated, but upon such conditions as the Provincial Governments may see fit to impose. The conditions might be on these lines:

(*a*) For the lands held by Speculators—individuals, syndicates, and corporations — a condition that they will pay a prescribed price per acre to the Provinces, and agree to sell the land to any settler or person who wants to acquire it for settlement or operative purposes at a price to be fixed by the Provincial Governments.

(*b*) For the lands held by Railway Companies whose systems run outside the Provinces, conditions similar to those of Speculators as set out above (*a*).

(*c*) For the lands of Railway Companies whose systems traverse the Provinces, a condition that they will pay a prescribed price per acre to the Provinces and either resell at a prescribed price as set out above (*a*) or else agree to a tariff of freight charges for all farm and other produce passing into, through, or out of, the Provinces for a period of stipulated years.

(5) As a consideration for an amicable adjustment along these lines the Provinces should waive the interest which otherwise would be payable as a compensation for the Dominion Government's expenditure in managing and controlling the Western Land.

I have formulated these views as a basis of adjustment and not as a bone of contention. The day of the

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dog with its nose on the ground and its tail in the air is, I trust, over so far as this controversy is concerned. Let us henceforth be Canada's helpers and not her howlers.

Much of our present trouble is the result of a slip-shod arrangement made by Manitoba in 1870. It was then in the throes of insurrection, and though the inhabitants of the Red River Settlement were, as a placative, promised a Provincial status equal to that of the other Provinces, the promise was not performed, nor in truth at the time could it be performed either by the Imperial Government or the Government of the Dominion. Both Governments were pledged to perform the conditions on which the Surrender of the Hudson's Bay Company was made, and retention of the land from the prematurely created Province was essential to that performance. That is the reason, the only reason, why the administration over Manitoba Lands was permitted to be retained by the Dominion Government. It was never intended to be permanent. It was the impetuous folly of the overflow of the East into the new territory which roused the settlers of Fort Garry into revolt; and General Garnet Wolsey with his two regiments of British Soldiers could only placate them by promising them what, it was afterwards found, he could not perform—a full Provincial Status. This involved control over the land, and as a *ruse de guerre,* the old Postage Stamp was named a Province and given what the agitators more immediately needed than a vast area of unoccupied land,—an annual dole of ready money as an equivalent for what was withheld from them. Besides that, the titles of the agitators to land which they claimed were confirmed or new grants made to them just as rapidly and extensively as they were asked for. Thus their fury abated; and they subsided into quietude; but they left an inheritance of trouble which should have been ended by the men who came upon the scene of Manitoba's life about eighties of last century. There was an excuse for the

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culpables of 1870; there was none for those of 1880, nor for those of the years since then. They, when the West began to develop, should have insisted upon the rectification of the wrongful distortion of the Constitution; and on the restoration to the Province of the control over its lands.

Manitoba played the poltroon. Time and again it negotiated with the Dominion for exchanges of territory and for extensions of its boundary; and every time it altered its original area it was acquiescing in the Suzerainty of the Dominion. The ratification by the Imperial Parliament of the first Act establishing the Province of Manitoba only, at best, extended to the original area; and for every retention of land, since added to the Provincial boundary, the Province itself is to blame.

What the exact status of Manitoba is, it is even now impossible to dogmatically say. My own opinion is clear. Any Province which has not the *dominium* over its land is not a Province of Canada under the B. N. A. Act. But then there is a clear distinction between a Province like Manitoba which has been a party to the abdication of its own rights, and Provinces like Saskatchewan and Alberta which had the yoke of a degrading Suzerainty imposed upon them by a treasonable combination of perfidy and autocratic power—a yoke against which they protested with ever augmenting vehemence year by year since 1905.

The saddening feature, however, of the spectacle is that not a man—not a leader—among the protesting and clamouring crowd ever stopped to think what was the Right and the exact Constitutional position of Alberta and Saskatchewan. Now they know it, thanks to the pen of the present writer and to the CANADIAN LAW TIMES. But they would not, and did not, believe what was put forward till the Privy Council set upon it the seal of approbation. We may contemn but we cannot shame the truth. Nor can we eventually suppress it. It arises ever upwards and, though buried

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miles deep under the obloquy, it will eventually glisten like crystal on the surface.

III. Tax Exemptions.

There is another great Constitutional issue, second only in importance to that of the Ownership of the Land. It is this:

(*a*) What was the authority of the Parliament of Canada in 1881 to stipulate with the C. P. R. in its Railway Construction contract for a perpetual exemption from taxation of the entire system and of the capital stock, not only by the Dominion, but by the Provinces to be established in the North-West Territory and by the Municipalities therein? And

(*b*) What was its authority to impose this obligation *nolens volens* on the new Provinces?

It was an alienation by anticipation of the Provinces' Right of Taxation; and though it has been assented to as valid in law all through the years, I propose to discuss it from a contrary and from a rightful viewpoint in the next issue of the Canadian Law Times.

Bram Thompson.

Regina, June, 1922.

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THE COURTS AND THE COMMONWEALTH.

By Charles Morse, Registrar Exchequer Court of Canada.

(Continued from May issue).

In view of all this you will agree with me that the Great Charter of John symbolises at one and the same time the purpose of history, and the passion for Order and Liberty that marks the English collective mind. It avowedly came out of the past, it expressed the spirit of its age, it is a living force to-day. It was the morning-star that ushered in the day of England's constitutionalism, the day of her greatness as a nation and as an Imperial State. I think, therefore, that we may heartily concur with Stubbs when he says that the whole of the constitutional history of England is little more than a commentary on Magna Charta.[18]

When my concern is with the relations of the Courts to the Commonwealth, or, as Raymond Poincaré puts it, "the social function accomplished by justice," you may regard my discussion of Magna Charta as savouring more or less of digression. It is not. Not only did Magna Charta expressly utilise judicature as a part of the constitutional mechanism of the State, but so far as its provisions are infused with popular liberty it caught this spirit from the democratic atmosphere surrounding certain courts established in England before the Conquest, and maintained, with some modification in their constitutions and jurisdictions, by the Conqueror and his immediate successors. These are known as "local" Courts, so designated because they depended upon custom and the consent of the parties for their authority in judicial proceedings and not upon any ordinance of the king or other source of legislation. They were not the "King's Courts" before the

[18] Const. Hist., vol. 1, ch. XII.

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Conquest, and continued to be distinctive in this way until the people of Saxon origin themselves came to prefer Norman orderliness to their own looseness in the administration of Justice.[19] The chief of these local Courts were the Shire-moot, or County Court, and the Hundred-moot. Even had I the time to discuss at length the constitution and procedure of these Courts, it would be quite unnecessary as there is now available to all interested a whole library of commentaries on the subject, popular as well as pontifical. It will not be amiss for me to quote in this connection an illuminating passage from Dr. Hannis Taylor's *Origin and Growth of the English Constitution* (p. 202):—"The courts of the shire and hundred were not only the judicial but the administrative workshops of the constitution. In addition to the administration of justice, these courts transacted such business as the levying of military forces, the adjustment of local assessments and the regulation of the system of police; and in their presence were performed all acts that required special publicity, such as the making of sales and the execution of important documents. These local courts, in which were discussed and settled nearly every question in which the body of the people were directly concerned, survived the shock of the Norman Conquest, preserving in their organisation and procedure the germs out of which the greatest of English institutions were to spring. Out of the representative principle imbedded in the courts of the shire and the hundred were developed, under the influence of Norman administrative ideas, the jury system, and the system of representative government."[20] Touching the principle of representation, there is no doubt that it was operative in a higher degree and was more constant in the local courts than in the national assembly. In the latter no matter what the theoretical right of the

[19] Inderwick's King's Peace, pp. 42, 43; Pol. & Maitl. Hist. Eng. Law, 2nd ed., p. 202.

[20] See also Stubbs' Sel. Charters, 71, 73; Feilden's Short Const. Hist. of Eng., 4th ed., pp. 70, 71.

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ordinary freeman was, he had no actual place there. Thus in practice, the Witan was an artistocratical body, and it is to the local courts that we must properly look for the genesis of our representative institutions.[21]

So much for the boon of popular liberty bequeathed to us by the local courts of the Anglo-Saxons. On the side of Order, however, they left much to be done for us by the Norman polity.

I have said that these local courts depended upon custom and consent of parties for their authority in judicial matters, consequently no party against whom judgment was given could have been constrained to obey it by any punitive process appertaining to the forum concerned.[22] This lack of coercive authority in the local courts was a serious defect in the administration of justice before the Conquest, and it was aggravated by the policy of the State in confining the course of justice to popular channels and discouraging anything in the nature of appeals to the King or the National Assembly.[23] Furthermore, the orderly administration of justice in Saxon England was embarrassed and impeded by the large number of tribunals in existence other than the Shire-moot and the Hundred-moot, with concurrent, or private overlapping, jurisdictions. There were the Manorial Courts, the Court Leet, the Sheriff's Tourn, and certain Courts ecclesiastical, over which the bishops presided.[24] So that William the Conqueror would have been puzzled indeed to choose a proper forum in which to carry out his coronation oath to enforce the laws as they obtained in the time of Edward the Confessor—laws which are referred to in many charters and statutes as *bonæ at approbatæ antiquæ leges Angliæ*. Hence, reforms to effect order and method

[21] Cf. Taswell-Langmead, op. cit. pp. 24, 25.
[22] Cf. Pollock's Expansion of the Common Law, pp. 145-6.
[23] Cf. Hallam, Midd. Ages ii., p. 269; Essays in Anglo-Saxon Law, p. 25.
[24] Medley, Eng. Const. Hist., 5th ed., p. 601.

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in administering justice were loudly called for in eleventh century England. Remedial measures in this direction were begun by William I. when he forbade bishops and archdeacons to hold ecclesiastical pleas in the local courts. But what was wanted was a consolidation of the courts, and uniformity of procedure. While the Witan was ostensibly continued under its name of the *Magnum Concilium,* it really became an assembly of the king's feudal vassals.[25] Its ancient powers, executive, judicial and legislative, were reduced to a shadow, and the royal authority became the vital and controlling force in the constitution. In these circumstances it was but natural that a smaller body, or standing committee, should be brought into being to assist the king in the work of administration. It was especially needed for the purposes of judicature. Following the model afforded by Normandy, William instituted one Supreme Court, known as the *Curia Regis,* or *Aula Regis,* wherein the king sat to administer justice in person, with the counsel and advice of the vassals of his household and such other persons as he summoned on account of their knowledge of the law. In the absence of the king, the Court was presided over by the Justiciar, who was the king's lieutenant throughout the realm, and acted as viceroy when the king was abroad. The *Curia Regis* discharged other functions than those purely judicial, but as a legal tribunal it had plenary civil and criminal jurisdiction, both original and appellate. As a Court of first instance it took cognisance of all causes where the king's interests were affected, and of all suits between the Crown's tenants-in-chief; but until the reign of the first Angevin king, Henry II., it was not open to the plaints of the lesser vassals and the ordinary freemen of the realm. On the other hand, as an appellate tribunal, with the king's consent witnessed by his writ, it could be resorted to by all those who failed to get justice in the local courts.[26] Henry, finding that

[25] Freeman, Norm. Conq., vol. 5, p. 277.
[26] Cf. Stubbs, Const. Hist., vol. 1, p. 391.

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the barons were using their feudal franchises to oust the jurisdiction of the local courts, as well as that of the *Curia Regis,* corrected this disorder in a very effective way. He found that his grandfather, Henry I., after he had thoroughly organised the Exchequer committee of the King's Court and appointed as its justices (known as Barons of the Exchequer) the ablest men in his kingdom, established a practice of sending certain of them in their official capacity down to the Shire-moots to speed up the collection of the revenue in the counties when the zeal of the sheriffs appeared to flag in this respect. Naturally, when the sheriffs' accounts were investigated in the presence of the debtors, complaints of extortion arose loud and deep, and they had to be heard by the visiting justices.[27] Henry II. saw in this practice, if made permanent, something that would correct the poaching enterprises of the feudal courts, and at the same time give symmetry to the administration of justice in the kingdom. We therefore find that in the year 1176, the king began some constitutional house-cleaning on a very generous scale. All the counties in the realm were divided into six circuits, and three justices of the *Curia Regis* were assigned to hear pleas of the Crown in each of such districts. These *Justiciarii Itinerantes,* or Justices in Eyre, sitting in the Shire-moot or County Court, transformed it eventually into an assize branch of the *Curia Regis* in which not only pleas of the Crown but suits between subject and subject were justiciable. The latter could be entered for trial by virtue of the King's writ, obtainable "at a price" during Henry's reign and those of his immediate successors—hence the prohibition in Magna Charta upon selling "right and justice." Some two years later (1178-9) Henry did not hesitate to reform the constitution and procedure of the *Curia Regis* itself in the interests of suitors of low degree. He empowered six of the justices of that august body to sit as a tribunal *ad audiendum clamores populi.* These six

[27] Cf. McKechnie, Magna Charta, 2nd ed., p. 10.

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judges from the year 1179 sat *in banco;* but it seems that this was not the origin of the Court of King's Bench as we know it. Mr. Pike (House of Lords, p. 32) shows that the bench so established was rather the predecessor of the Court of Common Pleas. However, Henry II. not only made a royal court out of the ancient County Court, but he threw open the doors of the distinctively Norman tribunal, the *Curia Regis,* to the "complaints of the people." Nor did he hesitate to take away the final appellate jurisdiction of the latter, and assign it to the body more immediately under his control, namely the *Concilium Ordinarium,* or King's Council.[28] It is worthy of remark that the first three Henrys in our list of kings were the founders of our modern system of judicature. We have already seen what the first two of them achieved in this way. Before the time of Henry III., Magna Charta had given fixity to legal business and cheapened royal justice by providing that "common pleas," or causes between subject and subject, should not follow the "Court" (*i.e.,* the royal household), but should be holden in some fixed place. (Chap. 17). The famous case of Richard of Annesty illustrates the awful experiences of suitors who had to wait upon the king's pleasure to hear their complaints. Annesty's own story of his legal pilgrimages will be found in Stephen's *History of the Criminal Law,* vol. i., p. 88. In his suit to recover possession of certain land he was obliged to follow the king's wake (and Henry II. being king, it was a hard wake to follow!) for some five years, visiting every place of note in England, and going abroad to Normandy, Aquitaine and Anjou. He ultimately succeeded in his suit, but before it was won he had spent all his money, and was forced to borrow from the Jews at the rate of 86 2-3 per cent. What a story of the "law's delay" for some Dickens of the Middle Ages!

Although the last-mentioned provision of Magna

[28] Cf. Taswell-Langmead, op. cit. p. 125; Ben-Abb. I., 207; Medley, op. cit. 102.

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Charta supplied the final measure of order and stability to the administration of justice that was needed at the time, it is reasonable to expect that all its implications in the way of giving distinctive jurisdictions to the three committees of the *Curia Regis* would not be realised at once. It was not until the reign of Henry III. that a regular Court of Common Bench was instituted. In 1235 Thomas de Muleton was appointed Chief Justice of the Common Bench, and thereafter personal actions ceased to be heard at first instance in the *Curia Regis* or in the Exchequer Court. It was in the Common Bench that the title of Chief Justice is first heard of, and it is hardly correct (*pace* Lord Campbell!) to regard the Norman office of Chief Justiciar as an anticipation of it. That office was primarily an administrative one—judicial duties falling upon it only in a secondary way. When the office of Chief Justiciar fell into disuse in the reign of Edward I. (it was not expressly abolished), its administrative powers devolved upon the Lord Chancellor in his political capacity and not as the head of the Court of Chancery, because that Court as a distinctive tribunal had its foundation nearly a century later. A very practical side-light is thrown upon the difference between the two offices in the case of the first Chief Justice appointed to the Court of King's Bench in 1268. This was none other than Robert de Brus, grandfather of Robert Bruce, King of Scotland. In his time the office of Chief Justiciar was yearly worth 1,000 marks—equal to £15,000 in English money to-day. He was one of the Justiciars, but when he accepted his new office, he found that his yearly salary was fixed at 100 marks. Tradition has it that he was a good lawyer; but without further information we might be rash in assuming that the politician was worth ten times as much to the State as the judge, in those days.[29]

After this thorough organisation of the Courts under the presidency of trained men, the king ceased

[29] Cf. Inderwick's King's Peace, p. 80; Foss' Judges, vol. II., p. 155; and Campbell's Lives of Chief Justices, vol. I., p. 79.

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to sit there as the dispenser of justice. James I. tried to revive the ancient right of the sovereign to sit as a judge in the King's Bench, but he was informed by the judges that he could not deliver an opinion.

And so, as the result of reforms begun by the first and completed by the third of the Henrys, when Edward I. came to the throne he found the *Curia Regis* faded into disuse, and its progeny, the common law Courts of King's Bench, Common Bench and Exchequer, sitting in its stead in Westminster Hall. Its appellate jurisdiction, as we have seen, had been taken over by the King's Council in Henry II.'s reign. It is a notable thing that while the *Curia Regis* was brought into being by the Conqueror as a means of strengthening the autocracy of the Crown and undermining the pre-Conquest system of self-government, it ceased to exist after Magna Charta had put a bridle on the King, and self-government had been restored to the people through the instrumentality of Parliament.

But the good that the *Curia Regis* did in its two hundred years of existence was much, and that good lives on for the healing of the nation. At its coming it found justice so dispensed in the commonwealth that Liberty was served at the expense of Order. By its means the ancient justice of the shire and of the folk—which had its origin in tribal insularity—was transformed into the justice of the nation; and the national peace became the "King's Peace," which is only a synonym for Public Order.[30] Furthermore, it was during the existence of the *Curia Regis* that the foundations of our modern Common Law were laid. And the Common Law is the symbol of the English concept of social justice as well as of the will to enforce it. It is true that the spirit of our Common Law is Teutonic, and that there were laws and customs operative in England before the Norman Conquest; but these were sectional in their character and, in many cases, mutually repugnant. There were a Wessex law, a Mercian law, and a Dane law, but no Common Law

[30] Cf. Pol. & Mait. Hist. Engl. Law, 2nd ed., pp. 44, 45.

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of the land in that day.[21] The Common Law is, roughly speaking, a thousand years old; yet its "eye is not dim, nor its natural force abated." It is quick to meet the demands of changing conditions upon it, because it is uncoded. So long as it is kept fluid the arteries of the body-politic through which it courses will never become hardened. Let me cite but one informing instance of the adaptability of the Common Law to varying conditions as well as of its genius for safeguarding the liberty of the subject. The case arose in the reign of Anne, some seven years before the fall of Port Royal in Acadia to British arms. Under a resolution of the House of Commons existing at the time, the right of voting at an election for the borough of Aylesbury was enjoyed by all inhabitants not in receipt of alms. Ashby, an indigent person, had recently come to Aylesbury, but had been warned out of the parish by the Overseers of the Poor, and the Justices had ordered him to depart therefrom. At this juncture a general election took place, and Ashby's vote was refused by the constables of the borough because, not having contributed to the Church or the poor, he could not be regarded as a settled inhabitant. Ashby brought an action against one of the constables and obtained damages at the County Assizes. A motion was made in the Court of Queen's Bench in arrest of judgment on the ground that the action did not lie. The matter coming to the attention of the House of Commons, the House considered the interference of a court of law, in a question which concerned the right of election, as a breach of their privilege, and ordered all the parties concerned therein —counsel, attorney, and others—to be taken into custody. Lord Chief Justice Holt was also ordered to attend the House, but he ignored the summons. The Speaker was directed to proceed with the mace to the Court of Queen's Bench and command his attendance upon the House. This being done, the Chief Justice is said to have replied: "Mr. Speaker, if you do not

[21] Cf. Carter's Hist. of Engl. Leg. Inst., 4th ed., p. 46.

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depart from this Court, I will commit you, though you had the whole House of Commons in your belly." The Queen was compelled to prorogue Parliament to put an end to the dispute. Lord Holt's view that the Common Law Courts had jurisdiction in such a case, which the House of Commons was bound to respect, ultimately prevailed. In this way Parliamentary autocracy at the expense of the people was nipped in the bud.[82]

What the English Courts as a whole have done for the maintenance of constitutional Order and Liberty is writ large in the reports, covering a period of seven hundred years. These reports constitute a real history of the people during that period, and reference to them is an ever increasing habit of the students of sociology. It is quite unnecessary for me to enlarge upon what the Judicial Committee of the Privy Council has done in holding together the units of the Empire for the past two centuries. You are familiar with it all. What the Judicial Committee has achieved in this respect is comparable only to what the Supreme Court of the United States—"the living voice of the Constitution," as it has been called—has done in checking tendencies toward disintegration in the American Union.

It is my hope that I have not wearied you by my extended survey of the origin and development of the Common Law Courts as part of the constitutional mechanism of the mother-land. As I have said in effect before, to view the fact of the establishment in this country of a Court administering the English Common Law merely from the point of view of the antiquarian is not enough. Leopold von Ranke somewhere ventures to say that "facts without their philosophy are but barren and rigid chronicles." The philosophy of the founding of this Court in 1721 lies in the response it makes to the genetic tests of tradition and character. Viscount Bryce says: "What habits are to the individual man, that to a nation are

[82] Cf. Jennings' Anecdotal Hist. of Br. Parliament, 3rd ed., p. 46; 14 How. St. Tr. 695.

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its traditions. They are the remains of the Past turned into the standards of the Present."[23] And Bergson pertinently asks: "What are we, in fact, what is our character, if not the condensation of the history that we have lived from our birth—nay, even before our birth, since we bring with us prenatal dispositions"?[24] The "prenatal dispositions" of Governor Phillips' adventure in nation-building that we are celebrating to-day were those that inclined him to realise social order in the English way for the little community over which he was set. It is not fair to rob Governor Phillips of the true initiative in this matter by assuming that he was simply doing what he was directed to do. In this connection I will ask you to allow me to extract one or two passages from the official papers. It is true that it would appear from the third volume of the "Nova Scotia Archives," p. 28, that he was expressly instructed "to make the lawes of Virginia a rule or pattern for this government where they can be applicable to the present circumstances." But the words I have quoted are really Phillips' own interpretation of the instructions for the information of his Council, and they imply more of a command than the language of the official document warrants as we find it in the second volume of the "Acts of the Privy Council," Colonial Series, p. 762. There we have it recorded that orders were given to the Secretary of the Lords Justices in Council, on the 25th June, 1719, "enclosing the Commission and Instructions prepared for Colonel Philips (*sic*) and recommending that as these are not as extensive as those for other more populous plantations, he should have with him a Copy of His Majesty's Instructions to the Governor of Virginia, which may be of use to him so far as they shall be Applicable to Cases that may happen, and are not sufficiently provided for by these Instructions, till His Majesty's further pleasure be known."

There is no positive command there to make the

[23] Hindrances to Good Citizenship, p. 128.
[24] Evolution Créatrice, ch. 1.

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"lawes of Virginia a rule or pattern for this government," and certainly there is no direction to Phillips to create a "Supreme Court of Judicature." And so far as I know we must accept the record in the "Acts of the Privy Council" as authentic. But that is not all. Even in the very ample set of instructions given to Phillips, as Captain-General and Governor-in-Chief of the province, by Queen Caroline (then Guardian of the Kingdom) on 1st July, 1729, there is nothing specific either as to erecting a court of judicature, or as to applying the "lawes of Virginia," or any other legal system. (See sec. 9 of these Instructions in Dominion Sessional Papers (1883) vol. 16, No. 12, p. 26). On the other hand, Phillips is required to advise both the King and the Commissioners for Trade and Plantations "what persons are proper and fit to be Judges, Justices or Sheriffs; and any other matter or thing that may be of use to His Majesty in the establishing a Civil Government." (Sec. 10). And until such a Government was established, Phillips was to "conduct himself," till His Majesty's further pleasure was known, by the instructions given to the Governor of Virginia so far as applicable. Furthermore, he was not to "enact any laws" till His Majesty had appointed an Assembly, and given him directions for proceeding therein. Therefore, so late as 1729 Phillips had not been positively directed to set up such a measure of Civil Government as would inhere in the operations of a Court of Judicature. Hence, the question arises, are we not entitled to regard his establishment of the Court in 1721 as due to his own initiative impelled by his native instinct for social order, for Phillips was an Englishman born and bred? There is an incident germane to Phillips' action, but antedating it some five years in colonial annals, which shows that the time-spirit had moved other minds along the same direction. In the second volume of the "Nova Scotia Archives," pp. 28, 29, there is to be found an official communication from Major Caulfeild

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(another Englishman acting the while in Annapolis as deputy or lieutenant to Governor Nicholson) to the Board of Trade, bearing date the 16th May, 1716. This communication is interesting in two ways. First we learn from it that Caulfeild, there being no civil court of judicature in existence, undertook to adjudicate between parties at variance, founding his jurisdiction, in the manner of the Anglo-Saxon "local Courts," upon the consent of the parties. Secondly, it throws a useful side-light upon the character of General Francis Nicholson. When he learned that Caulfeild was administering civil justice in this way, Nicholson sarcastically enquired of his deputy what commission he had giving him such authority. I quote Caulfeild's reply, which must be counted unto him for righteousness:—"I answered that as I had the honour to command in the absence of the Governor, I should always endeavour to cultivate as good an understanding amongst the people as possible, believing the same essential for His Majesty's service, and though I had no commission for that effect, yet I held myself blameable to suffer injustice to be done before me without taking notice thereof, having never interposed farther than by the consent of both parties." Parenthetically let me say here, that after studying Nicholson's career with some care, I am persuaded that he was one of the class of people that the pessimist Schopenhauer had in mind when he observed that while there are many beautiful landscapes in the world, the human figures in them are poor and better not be looked at. In short, Nicholson was a "rotter"; and not all the efforts of his apologists, such as J. A. Doyle,[35] can rebut the evidence of his ignoble conduct as it appears in the "Nova Scotia Archives" (vol. 2), and in the colonial records of New York, Virginia, and Maryland. To return again to Governor Phillips and his prime responsibility for the creation of the Court in question, let me refer you to a letter written by him to the Secretary of State shortly after the event, in

[35] English in America, pp. 354, 433.

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which he refers to it in this wise:—"In order to establish civil government, the Governor and Council have resolved themselves into a Court to meet four times a year. The notion that martial law prevails here hinders settlers from coming into the country." That communication seems to indicate clearly that Phillips was advising the British Government that he had set up a measure of civil government off his own bat, and without waiting for directions from his superiors. Correlating it with the other facts I have noted, I feel reasonably confident in ascribing to Governor Phillips alone the credit of bringing into existence the tribunal of 1721. Constitutional lawyers may think that in the circumstances he had no authority for what he did. The official mind may regard him as over-bold. Be that as it may, we can justly apply to his conduct the saying of Emerson, namely, that "the charm of the best courages is that they are inventions, inspirations, flashes of genius."

Governor Richard Phillips in his day and generation served the purpose of history well. His sphere of action was a limited one, but who can doubt that his conduct, in setting up civil government in Nova Scotia in such measure as was possible at the time, materially helped to retain the province as a British possession during the troublous times that ensued before Halifax was founded in 1749?

The Court established in 1721 consisted of the Governor and the members of His Majesty's Council for the Province. It was to meet four times in the year, namely, in May, August, November and February. Its procedure was modelled upon the practice at the time prevailing in the General Court of Virginia, composed of the Governor and Council of that colony.[26] Mr. Justice Chisholm discusses in the articles I have mentioned some of the cases that came before the Court during its existence in Annapolis Royal. When Halifax became the seat of government

[26] See "Nova Scotia Archives," vol. II., pp. 28, 29.

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for a short time, judicature was carried on there by the Governor-in-Council, sitting as the General Court, and by a County Court framed upon the lines of the tribunal of that name then existing in Virginia. These two Courts took cognisance of all matters, civil as well as criminal. In 1752 the County Court gave way to the Court of Common Pleas, and in 1754 the General Court yielded its jurisdiction to the Supreme Court with Chief Justice Belcher at its head.

By following the lead of Virginia, and making the Governor and Council her Supreme Court of Judicature, Nova Scotia in the early days we are considering simply reproduced the *Curia Regis* of eleventh century England. Mark the continuity of history in that. Furthermore, by adopting the "lawes of Virginia" she was but taking the Common Law of England at second-hand. It is a common-place that the colonists of the English plantations in America carried with them as a heritage so much of the Common Law as was suited to their new social life in a strange land. So closely has Virginia adhered to the law of the home-land that it was only during the past year that her courts ventured to rescind a rule laid down centuries ago in England, but which was found to work inequitably in the changed conditions of modern times.[37]

Just how much of the true Virginia strain marked the incunabula of Nova Scotia law it is not my purpose to discuss, for after all, at this day, is it not rather from the point of view of racial traditions that we rejoice that Nova Scotia declared that Virginia should be her norm and model in the early part of the eighteenth century? Freeman[38] asserts that the constitutional history of the American colonies does not begin with the landing of the English in America in the seventeenth century, but with the landing of the English in Britain in the fifth century. This, of course, supports the view which, if not always articulate is at least implicit in all I have said in this paper, namely,

[37] *Whitaker* v. *Lane*, 6 V. L. R. 681.
[38] The English People in its Three Homes, p. 360.

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that the progress of a virile people along the pathway of its potential greatness the world over is a very real manifestation of the purpose of history. Virginia, in a far larger measure than the Northern Colonies, reproduced the early features of civil government in England. To illustrate this I cannot do better than quote again from Dr. Hannis Taylor.[39] Recalling that Virginia began as a royal colony, and, after encountering many difficulties on the way, acquired the boon of representative government in 1619, he observes that down to this point her history "clearly illustrates how rapidly even a royal colony slipped from the actual grasp of the Crown, and how in its internal organisation it involuntarily reproduced the outlines of the ancient constitution. As the basis of its local organisation we find the hundred and the shire; in the colonial governor we have a reflected image of the kingship; in the royal council — the House of Lords; in the House of Burgesses — the House of Commons. The foundation of the whole fabric was English law." Thus whatever Nova Scotia obtained from Virginia in the way of government and law was thoroughly English in its essence and origin. How splendidly the people of Virginia in the seventeenth century responded to the English theory that neither kings nor governors are above the law appears in an incident noted by Hening, in his collection of the Statutes at Large of Virginia, Vol. 1, p. 146. It is serious enough in its bearings in all conscience, but yet has a very amusing side. It seems that Dr. John Pott, who, as Governor of the Colony, had busied himself particularly in establishing courts of justice, within a very short time after his retirement from office was himself arraigned for a criminal offence, and condemned. Oddly enough it appears to be the first record of a jury trial in Virginia. This is Hening's note:—"July the 9th, 1630. Dr. John Pott, late Governor, arraigned and found guilty of stealing

[39] Op. cit. vol. 1, pp. 21, 22.

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cattle, 13 jurors, 3 whereof councillors. This day spent in pleading; the next in unnecessary disputation: Pott endeavouring to prove Mr. Kingsmeal (one of the witnesses against him) a hypocrite, by a story of 'Gusman of Alfrach the Rogue.'" In view of the irony of his case ex-Governor Pott may well have exclaimed with Omar,—"Who *is* the Potter, pray, and who the Pot?'"

I have said that in celebrating this event we should endeavour to apprehend its pragmatic value for our own times. What lessons, then, shall we carry away from here? First and foremost, the recognition of our duty to see that the system of government we have inherited from the wise nation-builders of the past shall not be the sport of faddists and joy-riders to Utopia. We hear a great deal about the Constitution breaking down under the strain of the New Age—whatever that may mean. I do not think we are living in a New Age. Nietzsche says that man, being once an ape, is still more of an ape to-day than any ape. True, there are signs of the coming of a better order of international living than has prevailed under the law of the jungle tempered by diplomacy—and it is Canada's great privilege to be one of the heralds of that new dispensation. But who can say that in the narrower sphere of social life in English-speaking communities a New Age is upon us? What is there new in the revolt of the proletariate against the employers of labour? What is there new in the crank and the crook adding to the burdens of government in the time of their country's travail? We are simply going through a period when the march of civilisation is temporarily halted by a relapse into class hatreds and consequent social unrest. It will pass. But that passing will not take place before the attainment of at least a measure of the totality of the social and industrial reforms desiderated. It is always so. Heaven is not reached at a single bound, nor do I think that the best of all possible commonwealths will

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be set up in the earth during the present century. Before that comes Democracy will have to be spiritualised. That he who brings that to pass will save the civilised world is one of the unforgettable sayings of Mazzini. However, conceding this to be a period which favours the anarchist within our gates more than ever before, his bark is worse than his bite. But the very fact that his bark is vexing our peace should stimulate all good citizens of the British Commonwealth of States to take an active interest in maintaining their political systems in the wholeness and wholesomeness which marks them to-day. The constitution of the home-land is not perfect; but it is possible, judging from its operations during the past three centuries, that its limit of perfectibility has been reached. It may also be that the "nose of wax," as Francis Place satirically called it, is not susceptible of further twisting. And if constitutions are shattered, what then? It is highly necessary, therefore, that the knees of our public spirit throughout the empire should not be allowed to sag. Slackness in this respect is more to be feared than all the propaganda that echoes the cry of Jack Cade's army: "The first thing we do let's kill all the lawyers!" Herbert Spencer truly says that "no philosopher's stone of a constitution can produce golden conduct from leaden instincts." Among Joubert's splendid sayings you will find nothing wiser or finer than this: "In all things let us have *justice*, and then we shall have enough liberty." And, lastly, Ihering sums up our duty to the State in words that burn even in translation: "Law and justice cannot thrive in a country simply because the judge sits always ready on the bench, and the agents of the police power are ever at its command. Every man who enjoys the blessings of the law should also contribute his share to maintain the power of the law and respect for the law. Every man is a born battler for the law in the interest of society."[40]

[40] The Struggle for Law, Transl. by Lalor, pp. 77, 78.

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There is another lesson that we should carry with us of almost equal importance to the one I have just stated. That is the duty of deepening our sense of kinship with those who share with us the New World's heritage of English Order and Liberty. In that direction lies much assurance for our hope of the betterment of the conditions of international living alluded to a moment ago. The Right Honourable Lloyd George in his speech of welcome to the delegates to the Conference of Prime Ministers of the Overseas Dominions in London this year (1921) declared: "The future well-being of the world depends more upon the co-operation of Great Britain and America than upon anything else. An Anglo-American *entente cordiale* is the surest guarantee of future peace, which the world never more needed than it does to-day." This is the call of the mother to her over-long estranged children; and in Owen Wister's noble words we find the reason for the answer that America should give:— "All the best we have—*i.e.*, law, ethics, love of liberty —all of it comes from England, grew in England first, ripened from the seed of which we are merely one great harvest planted here by England." Canada can do no finer thing than to see that, so far as her assistance counts, this family reunion, with all it means to a distracted world, will surely come to pass.

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CONTRIBUTORY NEGLIGENCE.

By M. J. Gorman, K.C.

In the Canadian Law Times for January, 1917, I had the opportunity of discussing the above subject, as well as some collateral questions arising therefrom. I concluded that article by suggesting, as a statutory amendment, the extending of the provisions of sections 107 and 108 of "The Workmen's Compensation Act," which adopted the civil law rule of "comparative" negligence, to all cases of personal injuries arising from negligence. I submitted a copy of my article to the Attorney-General of that time, but he turned a deaf ear to my suggestion, and nothing came of it.

The appearance in *The Law Quarterly Review* for January, 1922, of a masterly article on the subject of "Contributory Negligence" by the Right Honorable Lord Justice O'Connor of the Irish Court of Appeal, has prompted me to revive the question. I took the liberty of sending him a copy of my article, and I received a very gracious reply, in which he said: —"I am greatly indebted to you for your letter, and the Canadian Law Times of January, 1917. Our ideas are pretty much alike. The law on this subject is a disgrace to our jurisprudence. I hope to keep pegging away at it."

I shall not attempt a summary of his article, as it is in itself only a summary of a very broad subject. I might merely say that he points out how unsatisfactory is the present condition of the law, and after discussing various formulas, including one suggested by Sir Frederick Pollock in his work on Torts, he concludes as follows:—"Whatever may be one's opinion as to the suggested formula, enough has been said to show that the present formula is, at least, perplexing and uncertain; and as there is nothing worse than ambiguity or uncertainty, it is to be hoped that the

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House of Lords will soon pronounce upon the whole question in such a way as to leave neither layman nor lawyer in any doubt as to the legal principle upon which liability must be determined."

With the greatest deference, however, for the hope expressed by this eminent jurist, I feel that past experience is not very encouraging as to the benefits that may be expected from a further pronouncement by the House of Lords upon the subject. See the recent decision in "The Volute" case, hereinafter discussed. He shows, at the commencement of his article, how fallacious was the hope that the judgment of the Privy Council in the case of *British Columbia Electric Railway Co.* v. *Loach,* in July, 1915, would have settled the law satisfactorily. In fact he seems to imply that that case actually supported the decision of the Irish Court of Appeal in *Gaffney* v. *Dublin United Tramways* (1916), 2 Ir. 472, which was afterwards overruled by the same Court. The head note of the latter case is as follows: The plaintiff, a partially deaf man, in crossing a thoroughfare, was knocked down and injured by a tramcar. The driver, previous to the accident, sounded the gong and shouted, but did not slacken speed. The jury found that the plaintiff was negligent in not keeping a proper look-out, but that the driver, by reasonable care, could have avoided the consequences of the plaintiff's negligence. They also found that the accident was not directly caused exclusively by the negligence of the driver, but was directly caused by the negligence of both concurrently; and they assessed a sum for damages:—Held, that on the findings of the jury the plaintiff was entitled to judgment for the damages assessed."

He points out that this Court, in a subsequent case of *Neenon* v. *Hosford* (1920), 2 Ir. R. 258, explained and modified the previous decision. In the latter case, the Lord Chancellor, at page 276, says:—"But this fact, once it is admitted that her (plaintiff's) negli-

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gence continued to the last, that she could, therefore, throughout have avoided the accident, cannot raise any equity in her favour . . . Even in *Gaffney* v. *Dublin*, in which Ronan, L.J., deals so elaborately with this branch of the law, I doubt if sufficient consideration was given to this particular aspect of the case, as in my opinion, where it is clear upon the facts that plaintiff and defendant were guilty of simultaneous negligence, so that each could, up to the last, have avoided the consequences of the negligence of the other, the plaintiff must fail, unless the original negligence of the defendant was some act or default on his part producing continuing incapacity to exercise ordinary care, as for example in the case of a drunken and incapable driver of a vehicle."

It has repeatedly been held in our own Courts that "concurrent" or "simultaneous" negligence does not entitle a plaintiff to recover where he has been guilty of contributory negligence: *Rice* v. *Toronto Railway Co.*, 22 O. L. R. 446; *Herron* v. *Toronto Railway Co.*, 28 O. L. R. 59; *Morris* v. *Hamilton Radial*, 22 O W. N. 38, and *Bowell* v *Galloway*, 22 O. W. N. 56. See also judgment of Duff, J., in *Brenner* v. *Toronto Railway Co.*, 40 S. C. R., at page 556. Lord Sumner, however, in the *Loach Case*, seemed to think that the Chancellor in the first mentioned case, and Justice Duff in the last mentioned case, did not distinguish between "concurrent" negligence and "ultimate" negligence, and apparently Lord Justice O'Connor does not, in his article, discuss the difference between them. In any case, it is quite clear that *British Columbia* v. *Loach* has not had the clarifying and settling effect that was expected from it. See also the belated report of the case of *Field* v. *Sarnia Street Ry. Co.*, 50 O. L. R. 260, particularly the judgment of Middleton, J., at page 264.

In these circumstances, I feel justified in again respectfully suggesting the proposed statutory amendment, as a real remedy for the difficulty. In my pre-

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vious article, I briefly referred to the fact that, in cases of collisions between ships, the civil law rule of "comparative" negligence prevails. The following are the provisions of the "Maritime Conventions Act, 1911," with reference to this matter:—

"1.—(1) Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damages or loss shall be in proportion to the degree in which each vessel was in fault:

Provided that—

(a) If, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and

(b) Nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed; and

(c) Nothing in this section shall affect the liability of any person under a contract of carriage or any contract, or shall be construed as imposing any liability upon any person from which he is exempted by any contract or by any provision of law, or as affecting the right of any person to limit his liability in the manner provided by law.

(2) For the purposes of this Act, the expression "freight" includes passage money and hire, and references to damage or loss caused by the fault of a vessel shall be construed as including references to any salvage or other expenses, consequent upon that fault, recoverable at law by way of damages.

2. Where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that vessel and of any other vessel or vessels, the liability of the owners of the vessels shall be joint and several;

Provided that nothing in this section shall be construed as depriving any person of any right of defence on which, independently of this section, he might have

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relied in an action brought against him by the person injured, or any person or persons entitled to sue in respect of such loss of life, or shall affect the right of any person to limit his liability in cases to which this section related in the manner provided by law.

3. (1) Where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that vessel and any other vessel or vessels, and a proportion of the damages is recovered against the owners of one of the vessels which exceeds the proportion in which she was in fault, they may recover by way of contribution the amount of the excess from the owners of the other vessel or vessels to the extent to which those vessels were respectively in fault;

Provided that no amount shall be so recovered which could not by reason of any statutory or contractual limitation of, or exemption from, liability, or which could not for any other reason, have been recovered in the first instance as damages by the persons entitled to sue therefor.

(2) In addition to any other remedy provided by law, the persons entitled to any such contribution as aforesaid shall, for the purpose of recovering same, have, subject to the provisions of this Act, the same rights and powers as the persons entitled to sue for damages in the first instance."

The recent decision of the House of Lords, reversing the Court of Appeal, in the case of *Admiralty Commissioners* v. *Owners of SS. Volute* (1922), A. C. 129, which was an action for damages under the above Act, is another illustration of the finely drawn distinctions that are necessary under the present state of the law. The defence of contributory negligence on the part of the plaintiff was raised, and it was held that the two acts of negligence need not necessarily be synchronous. Where a clear line can be drawn, the subsequent act of negligence of the plaintiff is the only one to be looked to; but in a case in which the two acts come so closely

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together, and the second act of negligence is so much a part of the state of things brought about by the first act that the party secondly negligent may invoke the prior negligence, as being partially the cause of the accident, it may be a case of contributory negligence, in which the plaintiff at common law recovers nothing, and in Admiralty the damages are divided.

The Lord Chancellor, who delivered the principal judgment, concluded as follows: "Upon the whole, I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while, no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the Bywell Castle rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution. And the Maritime Conventions Act with its provisions for nice qualifications as to the quantum of blame, and the proportions in which contribution is to be made, may be taken as to some extent declaratory of the Admiralty rule in this respect."

Lord Findlay confined himself to saying: "I regard the judgment to which we have just listened as a great and permanent contribution to our law on the subject of contributory negligence, and to the science of jurisprudence." This judgment was delivered after Lord Justice O'Connor's article was written, and he will probably have something to say about it later on. It is very doubtful, however, whether he will find in it the new "formula" which he hoped for. It may be remarked that the adjective "ultimate" as applied to negligence, does not appear therein. Lord Sumner, who delivered the judgment in the Loach case, and who criticised the term "ultimate negligence" as not "precise," did not take any part in this judgment.

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This English maritime rule applies only to disputes between one ship and another, either as to injuries done to each other, or to innocent third parties, and does not extend to disputes between ships and persons where both had been guilty of negligence: Beven on Negligence, 3rd edition, 179.

In Admiralty cases in the United States, however, this rule has been extended to cases of personal injury to servants. It was held by the Supreme Court in the case of *The Max Morris* (1890), 137 U. S. 1, which was an action by the servant of a ship-owner for personal injuries, that the employer was responsible, although the plaintiff was guilty of contributory negligence. This was followed in *The Julia Fowler* (1892), 49 Fed. 277. In a more recent case of *The Samuel S. Thorpe* (1900), 99 Fed. 108, some language was used which seemed inconsistent with these decisions, but the inability of the servant to recover was really put upon the ground that the ship-owner was not negligent.

The civil law rule as to "comparative" negligence in all cases of personal injuries, seems to prevail in several of the States: See Shearman & Redfield on Negligence, 6th edition, note 7 to section 61, and also sections 102 and 103. In other States, it seems to be limited to cases of personal injuries to servants: See Labatt on Master and Servant, 2nd edition, section 1229. For the latest illustration of the law of Quebec, see the decision of the Privy Council in *Montreal Tramways* v. *McAllister*, reported in 51 D. L. R. 429.

I might point out that the decision in the Volute case does not at all affect my argument for the adoption of the rule as to contribution, where both parties are to blame. No doubt the decision shows the difficulties which would still remain, as regards the establishment of the cause of the accident, but these cannot very well be remedied by legislation. The suggested amendment would, however, remove the reproach which I voiced in my former article, against the present law as being "entirely illogical in penalizing a plaintiff who has been guilty of contributory

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negligence, by ordinarily depriving him of any redress whatever, even where the defendant is equally or more guilty."

Sir John Salmond, who is a Justice of the Supreme Court of New Zealand, in the Preface to the fifth edition of his learned work on Torts, gives the following unexpected support to my views: "Another fundamental question which is still unsettled is that of the true nature of the rule as to contributory negligence. No more baffling and elusive problem exists in the law of Torts. In the last edition I thought it sufficient to formulate the rule without qualification in the form commonly recognized as that of the last opportunity. The recent decision of the Privy Council, however, in *British Columbia Electric Company* v. *Loach* (1916), A. C. 719, shows that, if this is indeed the true rule, it nevertheless requires elaboration and qualification. With much hesitation I have endeavoured to indicate what those qualifications are. An endeavour, however, to solve these difficulties leads to the conclusion that the common law rule of contributory negligence is essentially unsound. It seems impracticable to establish any satisfactory doctrine whereby, in cases where an accident happens through the combined negligence of two persons, the total liability is nevertheless cast on one or the other of them exclusively according to the circumstances. It would seem that the only satisfactory rule is that which is adopted in the Admiralty jurisdiction, namely, that of dividing the loss between the persons who are responsible for it in proportion to the degree of their fault."

M. J. GORMAN.

Ottawa.

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CORRESPONDENCE.

Victoria, May 25th, 1922.

The Bonanza Creek Case and Common Law Corporations.

The Editor, "Canadian Law Times,"

Dear Sir,—The contention made in your articles in the March and April issues that the meaning of the Bonanza Creek Case has been misunderstood is, I feel, undoubtedly correct. I do not think the judgment there has been read meticulously, as it deserves to be: not a word has been used except in its precise legal sense, and as applicable to the problems presented for solution. But unless the ideas expressed, for example by the terms "status"—"capacity"—"powers," "rights," etc., are properly realized, the judgment can be construed to mean anything—or nothing.

The decision rests, first on the consequences flowing from the creation of a Common Law Corporation; and next on the interpretation of prerogative or executive power as it has been transmitted through the medium of the "B. N. A. Act" to the Lieutenant-Governors of the provinces,—and rightly so, because the Companies Act in question was framed as an exercise of that power. Interference by a Legislature with the undiluted executive power is justified by s. 12 and 65 of the "B. N. A. Act."

It is most important to notice that running through the judgment there will be found expressions conditioning, qualifying and limiting the use of such terms as those above mentioned, for example (the page numbers referred to 1916—A.C.).

Page 578—"such a creature (sc. Common Law Corporation) where its *entire* existence is derived from the *Statute* will have the *incidents* which the com-

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mon law would attach if, but only if, the statute has by its language gone on to attach them." Then, "the statute may be so framed . . . ." etc., etc.

Page 582—"(Speaking of the Canadian Statute of 1864) the charter conferred on the company a *status* resembling that of a corporation at Common Law, *subject* to the restrictions imposed on its proceedings."

Let us stop at this point to consider what is there involved in the use of the word "status." It is submitted that it means that the corporation is the legal equivalent of a natural person, with unlimited capacity and unlimited powers and rights; but of course subject like any natural person to the laws of the country, and in particular, just as an infant or married woman, to any special provisions. There seems to be no reason why these special provisions should be expressed in any particular way, or cannot be specified either in the Letters Patent or General Act.

Again at page 583—"(Speaking of the Ontario Companies Act)—so that, subject to the express restrictions in the statute, it is by the grant under the Great Seal and not by the words of the Statute, which merely restrict the cases in which such a grant can be made, that the vitality of the corporation can be measured." The word "vitality" appears several times and its significance can be gathered from the passage on page 578.

"Companies with provincial objects but with an ambit of vitality wider than that of the geographical limits of the province"—that is, having a capacity to travel beyond the boundaries of its home.

Page 585— . . . The Ontario Legislature has not thought fit to restrict the exercise by the Lieutenant-Governor of the prerogative power to incorporate by Letters Patent . . ."

Then as to the *ultra vires* doctrine—

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Page 582—"The doctrine . . . does not apply where . . . the company purports to derive its existence from the Act of the Sovereign and *not merely* from the words of the regulating statute."

Page 583—"Actual powers and rights are one thing and capacity . . . quite another. In the case of a company created by charter, the doctrine . . . has no real application *in the absence of statutory restrictions added* to what is written in the charter. Such a company has the *capacity* of a natural person to *acquire* powers and rights."

And then the case of a true "statutory" company is contrasted, from which it is clear that the key to the distinction is this: A "chartered" company has unlimited capacity either for all purposes or to carry out the purposes for which it is established, depending on the restrictions (if any) contained in the Letters Patent and governing the statute. A "statutory" company must be able to point to a precise and definite expression or provision in its memorandum or governing statute before it can claim any right or exercise any power. With the former everything can be implied —with the latter, nothing—that is, put in the broadest way—but both alike are subject to limitation and restriction by Act of Parliament and their own constituting instruments.

To illustrate the distinction—

Page 577—" . . . a Company incorporated by . . . memorandum of association . . . could have no legal existence beyond, such as was required for the particular objects . . . to which that memorandum limited it."

Page 578—"The language (of the statute) may be such as to show an intention to confer on the corporation the general capacity which the common law ordinarily attaches to corporations created by charter. In such a case a construction like that adopted by Blackburn will be the true one"—namely—

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Page 577—" . . . to start by assuming that the Legislature meant to create a company with capacity resembling that of a natural person . . . and then to ask whether there are words in the statute which take away the incidents of such a corporation."

The distinction between unauthorized Acts of the two types of company may, perhaps, be summarized in this way: Where the Act falls within the *ultra vires* doctrine, it is void *ab initio;* but in the case of a "chartered" company it is merely a breach of its constitution and "gives ground for proceedings . . . for forfeiture," or any other consequence imposed by the law.

There does not appear to be any ground for drawing the conclusion that because an Ontario or Dominion Company has a status resembling that of a corporation at common law or a capacity analogous to that of a natural person, the company can, where its letters patent authorize a milk business, speculate in a gold mine. That is to disregard absolutely all the qualifications attached to the general notion of an artificial natural person in this case of the Bonanza Company.

Yours very truly,

H. G. GARRETT.

PROVINCIAL BAR RIGHTS.

The Editor, "Canadian Law Times,"

DEAR SIR,—It is quite a practice in the United States for the Attorney-General to call into co-operation with him experts on legal complexities with which he is, now and then, confronted.

It is an excellent and commendable practice and often it produces beneficial results, not only to the immediate problem, but also to the public. Very frequently, however, we find the theory of this put into a far from commendable practice. Our Provincial Governments, whether induced by the idea that familiarity breeds contempt, or by the illusion that the cow at a distance has fine horns, are prone to the practice of

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securing their experts from the adjoining Province. This is radically wrong. It cannot be defended unless the ultra-Provincial expert is superior to the intra-Provincial expert.

Why should the Manitoba or Alberta Lawyer be retained for a Saskatchewan cause by the Saskatchewan Provincial Government? He should not, unless there is no one equal to him at the Local Bar. Most—practically all—of the light of recent years on the legal problems of the West has radiated from Regina City. Witness the Divorce Law, and the Status of the three Western Provinces under the B. N. A. Act involving the most momentous of all questions, their Right to their Land and Natural Resources. Both these questions which were enveloped in mists for years were solved by you, Mr. Editor, from Regina City; and the fact is a fair criterion of the ability of Saskatchewan Bar to provide for the Provincial Government experts on any subject which requires from outside its Law Department legal co-operative skill. The same may be said *mutatis mutandis* with reference to any of the other Provinces. Why should the Ontario Government retain in a Provincial suit or investigation a Barrister from New Brunswick or Quebec or Manitoba?

When a case goes on Appeal to the Supreme Court it may be expedient to retain Counsel who have specialized as Pleaders before that Court. This expediency involves no slight to or stigma upon the Local Provincial Bar, but both slight and stigma are involved when a Barrister of an adjoining Province is retained to appear either in a Local Provincial Court or before some Commission of Enquiry or Investigation. It matters not, and changes not the principle, whether the Commission or Investigation is directed by the Dominion or Provincial Authority nor where it is actually held, so long as it is an affair of the Province.

Yours truly,

SASKATCHEWAN K.C.

EDITOR'S NOTE.—Provincial Governments do not delight themselves in giving honour where honour is due. Their policy is to ignore the man who achieves something for the public and to patronize the man who subserves the party. B. T.

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NOTABLE CASES NOTATED.

Bills of Sale—Book Debts.

In *Re Allister Limited*,[1] is an important question for Commercial Lawyers, especially for those in the parts of the Dominion where the English Companies Act has been adopted. The question involved was raised by a Liquidator of an insolvent Company as against Barclay's Bank, the former Bankers of the Company.

It appears that in England there is a custom by which Bankers advance money to customers on a pledge of goods, by delivery of Bills of Lading, Invoices, Insurance Policies; and when it is desired to realize the goods pledged to effect such realization the Bank or bailee returns to the pledgor the documents of title whatever they may be, upon the pledgor undertaking to hold the goods and the proceeds of the sale or realization on behalf of the Bank to the extent of the indebtedness for which they had been originally pledged.

This arrangement is carried out by a letter addressed by the pledgor to the Bank, which is held by it till its indebtedness is discharged.

The legality of such arrangements was disputed in *Re Allister Limited* by the Liquidator who claimed they were invalid both under the Bills of Sale Act (non-registration) and under Section 93 of the Companies Act.

An array of authorities was quoted, but Mr. Justice Astbury decided that the original pledge to the Bank was complete, as such, by delivery of the documents of title, and that the Trust-Letter given by the Pledgor to the Bank upon its handing back the pledged documents simply and solely for the purpose of and so as to facilitate and hasten a sale was neither a Bill of Sale nor an assignment or charge of book debts which

[1] 38 T. L. R. 611.

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required registration either under the Bills of Sale Act or the Companies Act. In the words of the Judge himself, "The answer to the contention appears to be that the document was no mortgage of or charge on book debts in any true sense. The Bank had its charge before the document; and the document was not intended to give a charge but to enable the goods to be realized as goods had been realized for years and years."

The cases cited were *Ex parte Hubbard*,[2] *North West Bank* v. *Poynter*,[3] *In re Hamilton Young & Co.*,[4] *Dublin Distillery* v. *Doherty*,[5] *and Ladenburg* v. *Goodwin*.[6]

Divorce—Constructive Cruelty.

The cruelty which entitles a spouse to relief under the Law of Divorce has long been treated as physical cruelty, but there is appearing now and then an awakening to the conception that there may be mental cruelty surpassing in anguish any physical suffering. Cruelty itself is not defined by the Matrimonial Causes Act, nor so far as we know has it ever been defined in Divorce Law anywhere. The interpretation of the word has rested with the Judiciary unless indeed it came before that august tribunal of commotions and emotions called the Senate of Canada. At all events the Judiciary have pretty nearly fixed cruelty as meaning physical acts or conduct involving at least pain and suffering to the body. The case of *Fenwick* v. *Fenwick*[7] is, however, indicative of a better and broader interpretation of the word cruelty. The acts complained of in this case were purely mental. The husband consorted with another woman and neglected his wife. He brought his paramour actually to his home and slept with her, and his lawful wife had to make the bed of

[2] 17 Q. B. D. 690.
[3] (1895) A. C. 56.
[4] 21 T. L. R. 759.
[5] (1914) A. C. 823.
[6] 28 T. L. R. 541; (1912) 3 K. B. 275.
[7] 38 T. L. R. 603.

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the debauchees. There were other fringes to this dour picture, and Mr. Justice Horridge held it was cruelty. There was one earlier case referred to on the subject, *Le Couteur* v. *Le Couteur,* reported only in the *Times* of March, 1896. But in that case physical cruelty was to some extent present and proved.

Bankruptcy—Property passing to Trustee.

Barber v. *Rigby, and another,*[8] is a case where Barber and Son, Stockbrokers, brought an action against Rigby and R. Rhodes as Trustee in Bankruptcy of one F. H. Heald, another Stockbroker, claiming an injunction restraining the Defendants from parting with 200 shares in Hollis & Co., Limited. Rigby it appears instructed Heald to purchase the shares named, and Heald placed the matter in the hands of Barber, the Plaintiff, with whom Heald had a running account. They bought the shares and paid for them. Rigby paid Heald for the shares and a transfer to Rigby was then sent by the Plaintiffs to Heald. On the morning of the day he received it he was adjudicated Bankrupt and the Transfer passed to the Official Receiver and was subsequently handed over to the Trustee in Bankruptcy (Mr. Rhodes), the second Defendant.

The first Defendant pleaded that the Plaintiffs were not entitled to the relief sought, and the second Defendant that he was willing to obey the Court's order.

Mr. Justice Darling found the share transfer was trust property and was not comprised in the property of Heald which passed to his Trustee in Bankruptcy. He ordered the Transfer to be handed to Rigby by the Trustee in Bankruptcy.

N.B.—It is hard to see how this case could have presented any difficulty. The Transfer was not in the name of Heald, the Bankrupt, but of Rigby, who had actually paid the price of the shares. If it had been

[8] 38 T. L. R. 650.

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in Heald's name there might have been room for a contest.

Criminal Law — Admissibility of Evidence of Acts Subsequently.

Rex v. *Armstrong*[9] is an interesting case from more than one aspect. Armstrong was charged with Murder and he had been a Solicitor in good standing and practice for many years. He was charged with poisoning his wife with arsenic, and the Defence was that she had committed suicide and that the accused kept the arsenic for killing weeds. The Judge admitted evidence that accused had, some eight months after the death of his wife, attempted to poison another person — a fellow Solicitor practising in the same place.

The admitted evidence had actually been given in a prosecution against the accused for an attempt to poison Martin with arsenic. The evidence in the Martin charges grew so strong against Armstrong that the prosecution was dropped and the Indictment laid for poisoning his wife. The accused's case was that he bought and kept arsenic and used it for killing weeds; and while he admitted his wife had died of arsenic poisoning he made the case that she got the arsenic not through his administration but either accidentally or intentionally for the purpose of committing suicide.

The suicide suggestion was refuted by overwhelming evidence. The Jury found him guilty, and the case came up on Appeal on a question of Law as to the admissibility of the Evidence in Martin's case. The Court of Appeal, though it gave an attentive and patient hearing, made short shift of the case presented when it came to a Judgment.

The mental intent is the great question in all crimes, and the Court held that the evidence in the Martin case was most proper and material as showing

[9] 38 T. L. R. 631.

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the intention with which the Prisoner bought and kept arsenic in such quantities as he was proved to have done.

It is a decision resting on nice points of the metaphysics of the Criminal Law; and we trust it will be wisely applied and not extended so as to deceive people into the belief that when a person is charged with a crime evidence of every other crime he is alleged to have committed can be brought forward to secure his conviction.

Crown Debts in Company Liquidation and Bankruptcy.

In *Re Webb & Co.*[10] there is an exhaustive discussion of the right of the Crown to payment in full and in priority to other Creditors of debts due to it.

It is a case which those concerned in company Liquidations and in Bankruptcy matters ought to study in conjunction with the particular provisions of our Winding-up Acts and Bankruptcy Act.

I propose myself at an early date to turn to the question of Crown debts so far as concerns their priority under the Bankruptcy Act.

There is in the Judgment of Mr. Justice Younger a citation from the Judgment of Lord Atkinson, 1920 A. C. p. 539, of the modern view of the King's Prerogative. Lord Atkinson clearly shows that when a Statute authorizes the Crown to do something which previously the Crown could itself do by virtue of its Prerogative, the Crown is not free to disregard the provisions of the Statute. "It was suggested that when a Statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its Prerogative, the Prerogative is merged in the Statute. I do not think the word 'merged' is well chosen. I should prefer to say that when such a Statute expressing the will and intention of the King and of the three Estates of the Realm is passed, it abridges the Royal Prerogative while it is

[10] 38 T. L. R. 579.

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in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions and that its prerogative power to do that thing is in abeyance."

Contract of Sale of Goods—Shipment by Steamer.

Sanday v. *Keighley*[11] is an important decision of the Court of Appeal on the meaning of a phrase frequently used in contracts for the shipment of goods purchased by Steamer expected to sail by a certain time. The facts are: The Plaintiff on 20th September, 1920, contracted to sell to the Defendant 1,000 tons of La Plata Oats for shipment from the River Plate. The contract contained a clause " shipment in good condition per first class steamer Indianapolis expected ready to load late September." The Sellers had chartered the Indianapolis and she had left Norfolk, Virginia, for Rio de Janeiro with Coal on August 10th to go to the River Plate in ballast. At the date of the Contract she had not, owing to repairing troubles, even arrived at Rio. Ultimately she left Rio on October 29th, and on November 2nd the Sellers informed the Buyers that she was expected to arrive in the River Plate about November 12th; but the Buyers replied that as the delay had been so great the contract could not be performed according to the words "expected ready to load late September."

The question was referred to Arbitration of the London Corn Trade Association, and it was found as a fact that at the date of the Contract the steamer was already overdue at Rio and that there was no prospect of her being "ready to load in the River Plate late in September;" that that stipulation was unjustified; and that the delay was so great as to frustrate the Contract.

Mr. Justice McCardie affirmed that award; and now the Court of Appeal upholds that decision.

[11] 38 T. L. R. 561.

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Much of the contest turned on the meaning of the word "expected" in the Contract. There were several suggestions of what it meant; but Lord Sterndale said he thought that "expected" meant "expected by the Sellers and not necessarily by the Shipping world generally, and that was, that in view of the facts known to the Seller at the time, the expectation was one which he could have held honestly and on reasonable ground," and he said the Sellers could not have had an honest expectation founded on reasonable grounds which could be justified.

It seems ridiculous that a contest of such magnitude could have arisen over an issue so palpable. The Shipper must be presumed to have had a knowledge of the position of the Vessel when he made the Contract; and if he had, he must have known by no possibility could she have been at the place of Shipment of the Corn at the end of September; and between September and the end of November there is a sufficient delay and default to justify a repudiation of a Contract for such a Commodity as Corn.

Divorce—Separation Deed—Subsequent Adultery.

Lister v. *Lister*,[12] had the unique satisfaction of being decided by Mr. Justice Horridge upon a principle in direct conflict with a judgment of his in *Re Lipman* v. *Lipman*,[13] which may henceforth be regarded as reversed and over-ridden.

In *Lister* v. *Lister* the husband and wife had entered into a Deed of Separation by which the wife covenanted not to take proceedings against the husband in respect of misconduct prior thereto; but it was provided that if the parties should be judicially separated for subsequent misconduct the provisions of the deed, one of which was condonement of previous misconduct, should become void.

[12] 38 T. L. R. 609.
[13] (1916) P. 25.

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The husband had been guilty of cruelty before and of adultery after the deed; and the wife presented a Petition for dissolution.

Mr. Justice Horridge over-ruling his previous judgment in *Lipman* v. *Lipman,* that the wife to get rid of the separation agreement had to get a separation for adultery, and that then she had to make a separate Petition for dissolution, held that the wife in the circumstances stated was entitled to an Order Nisi and he pronounced it accordingly.

Divorce—Guilty Petitioner—Court's Discretion.

Armstead v. *Armstead,*[14] is likely enough to be reviewed by the Appeal Court, but in the meantime it is an authority on the discretion of the Court to grant relief in Divorce Petitions where the Petitioning party has been guilty of misconduct. The ruling was made on the intervention of the King's Proctor after the Order Nisi had been pronounced. He asked for a rescission of the Order. The original suit was a Petition by the husband; and he admitted he had on two previous occasions committed adultery with a woman whom he intended to marry.

Mr. Justice Horridge said that *Wilson* v. *Wilson,*[15] and *Wilkinson* v. *Wilkinson,*[16] left him very little of a loophole. At the same time he did not think a guilty party himself had a right to come to the Court and get the Court's discretion exercised in his favour. Although it was generally in the interest of the public that where a child was the result of illegitimate intercourse, the guilty parties shoud marry, yet there were no extenuating circumstances in this case, such as there were in *Wilson* v. *Wilson,* where the adultery was committed with a woman whom the husband had brought into the home, after his wife had left, to look after the children.

[14] 38 T. L. R. 626.
[15] (1920) P. 20.
[16] 37 T. L. R. 835.

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He dismissed the Petition, but he refused to make any Order as to the Costs of the King's Proctor pending an appeal, which he allowed, as he said it was in the interest of the public.

(1) *Gaming Debts—Payment by cheque.*

Malone v. *Powell*,[17] is an interesting case on this subject. The Defendant was a Bookmaker, and the Plaintiff made bets with him. Sometimes one won and sometimes the other. The Plaintiff paid his losses by cheque, and the Defendant when he lost, sometimes instead of remitting cash or a cheque simply returned to the Plaintiff a cheque which had been uncashed of the Plaintiff's own, for a corresponding amount. The Plaintiff sued for the total amount of his cheques, whether they were returned in the way stated or not; and the Defendant counterclaimed for a sum paid to the Plaintiff for lost bets corresponding with the amount of the returned cheques.

The Court held the Plaintiff entitled to recover the full amount of his cheques issued in payment of his losses, even though some of them were returned to the Plaintiff uncashed, as payments of bets lost by the Defendant. But the Defendant was held not within the terms of section of the Gaming Act which provides that if any person shall make, draw, give or execute a Note, Bill, etc., for a gaming debt, the same shall be void, and that if such person shall actually pay the amount of the money thereby secured, such money shall be taken to be a debt due to the person who shall so have paid such money, and shall be recoverable by action.

This looks a hard case, or rather we should say if this is the right construction of the Gaming Act, it is unjust; and in the words of Mr. Justice Darling "the Law on the subject needs to be amended as soon as possible."

(2) Another interesting case under the Gaming Act has just been reported: Trustee in Bankruptcy of

[17] 38 T. L. R. 604.

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A. F. Scrutton v. *Pearse.*[18] It was first decided by Mr. Justice Astbury and now came up on Appeal. It was an action by the Trustee to recover under section 2 of the Gaming Act, 1835, money paid by cheque for a bet lost at gaming. The payor Scrutton became a Bankrupt shortly after the payment to Pearse, the Bookmaker. If the Bankruptcy had not intervened Scrutton could have recovered the money, but Mr. Justice Astbury restrained the action of the Trustee on the ground that it was something of a dishonourable character to sue for the recovery back of money lost and paid under a bet.

It seemed ridiculous to us when we read the Judgment; for the Trustee in Bankruptcy is in a fiduciary relationship to the Creditors as well as the Bankrupt, and it is his duty to bring into the distribution fund every penny that he can.

The Court of Appeal has upheld this view, and emphasized the Trustee's position as one in which he should not, and could not, balk at what a punctilious man of honour in his own affairs would shrink from doing.

N.B.—It is strange that the meaning of the Gaming Act, 1835, is only now being revealed by these actions for recovery of money lost in bets. Is the code of honour declining, or is money growing scarce?

Jury Verdict—Disputed by Jurymen who failed to hear it.

Ellis v. *Ellis*[19] was the case of an application for a new trial on the ground that the verdict entered in the action was not the verdict of the Jury. Affidavits to this effect were sworn by members of the Jury. It appeared that the Jury after they retired had come to a certain verdict or conclusion, but when they returned to Court to deliver it, the Jury box was occupied by another Jury, and they had to render their verdict from

[18] 38 T. L. R. 629.
[19] 38 T. L. R. 605.

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behind a screen of some kind and in such a way that the Foreman and perhaps only two others were in view or hearing of the other Jurymen or in hearing of the Court itself.

The Court took the occasion on the hearing of the application to make some comments on the practice which has recently grown up of certain newspapers publishing details of the discussions of the Jury between the time of their retirement and the delivery of their verdict; and strongly suggested that reports of this class were contempts of Court and would be dealt with as such.

The Court, in this case, set aside the verdict and directed a new trial.

B.T.

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BOOK REVIEWS.

A Handbook of Husband and Wife, according to the Law of Scotland. By Frederick Parker Walton, K.C. (Que.), B.A. (Oxon.), LL.B. (Edin.), LL.D. (Aberdeen and McGill). Second edition revised and in part rewritten, by John L. Wark, K.C., LL.B. (Glas.), Advocate, Sheriff of Argyll. Edinburgh: W. Green & Son, Ltd., Toronto: The Carswell Co., Ltd.

Though this is a work on Scotch Law it is a work of infinite value to the practitioner in this Country.

Both the English and Scotch Law of Husband and Wife originated in the Roman Law and have their basic principles rooted there. But while Scotland in this, as in other parts of her jurisprudence, preserved in its purity Roman Law, England's Law was moulded from period to period by the casuistries of the clerics; and as Canon Law it was more or less of a hybrid between Roman Law, ethics, and metaphysics. For the great principles of the Law and of the relationship between Husband and Wife under their marriage Contract, which at one time was called a Civil Contract and at other times an ordinance of the Church, we must go back to the Roman Law; and that is the great utility of the work now before us.

While it professes to be a second edition, it is in many respects a new work. This was a necessity seeing that the original work was published some 30 years ago; and what a change in the status and relationship of Husbands and Wives has been effected in those intervening years!

Of all the changes, this new edition takes full cognizance, and where necessary Mr. Wark has re-written considerable portions of certain chapters and re-arranged and divided others. In doing this effectually four hundred new decisions had to be considered, and an excellent chapter is added in the form of a Sketch of the English Law of Husband and Wife.

The work therefore will be found to contain many legal principles of the first magnitude as well as being

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a repertoire rich in references of the utmost value to the Canadian as well as to the English and Scotch Lawyer.

The book to which is appended a well arranged index can be had at the moderate price of $9.50.

The Principles of the Law of Contracts and Torts, with an Outline of the Law of Evidence, being Indermaur's Common Law, re-written and enlarged. By A. M. Wilshere, M.A., LL.B. London: Sweet & Maxwell, Ltd. Toronto: The Carswell Co., Ltd.

This, though modestly called by the Author in his Preface a new Edition of Indermaur's Common Law, is in reality a companion volume with Mr. Wilshere's well-known and highly valued Works on The Principles of Equity and The Elements of Criminal Law and Procedure.

Mr. Wilshere is an author who stamps his individuality upon his works which are perspicuous and concise to a degree that commands admiration. The present volume is no exception. It surpasses, in the quality stated, even his Principles of Equity; and of that work we had some time ago the pleasure of saying it was unique.

Indermaur's Common Law was the familiar friend —true and reliable and not overcumbersome—of every Student when first I began the most arduous of all feats—the mastery of first and general principles. But the man who knew Indermaur had acquired a store of knowledge which would place deep in the shade most of the practising Lawyers of the present day.

Indermaur's work, like everything else, began to show signs of age, and it required the infusion into it of new vitalities reflective of, and commensurate with, the most recent developments of legal conceptions as expressed in leading Authorities.

Our new conditions, especially of the past 20 years, have necessarily produced a great body of Law through the application to them of the old principles of our Common Law; and Mr. Wilshere has undertaken the work in this Edition of bringing Indermaur's

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Book up to date. To no more competent hands could the work have been entrusted. Editing is an inept word to describe the substantial changes which the author says the great developments of the Law and its interpretation had enforced upon him. All we can say is that the original author himself would be proud to read the emendations and additions of Mr. Wilshere; and that is subjecting an Editor's work to the most captious of authorities.

Emergency legislation law, and all quotations from other text books, with one exception, are omitted.

Heartily we commend this work to not merely the diligent Student, but to the Lawyer who wants to re-familiarize himself with the great broad principles of our glorious Common Law.

Analysis of the Law of Contracts and Torts. For the use of Students. By A. M. Wilshere, M.A., LL.B., and Douglas Robb, B.A. London: Sweet & Maxwell, Ltd. Toronto: The Carswell Co., Ltd.

This is a Second Edition of the work which largely was written by Mr. Douglas Robb, who was killed at Loos in 1915. It is an analysis, Mr. Wilshere says in a brief preface, based for the most part upon the Common Law of England by Dr. Blake Odgers, but useful also to Students reading Indermaur's Common Law, which we have just reviewed.

With every deference to the Author we say this book is something more than an analysis: it is a clear and precise statement of the Law in its most up-to-date form; and it is free of the confusions and dubieties which the mere analysis almost inevitably produces. It is a little gem of a masterpiece, and every student should revel in its sparkle.

Just for testing, we looked up some questions and found them all met in the book. With this work and the larger work, a Student certainly should know his Common Law relating to Contracts and to Torts.

We know of no books comparable with them for the real, honest, and diligent Student who is intent on

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mastering the cardinal principles on which, in future professional activities, he must so frequently rely in emergencies when he cannot just put his hand upon a precise authority.

B.T.

RECEIVED FOR REVIEW.

1. *The Law of Building and Loan Associations. By Joseph H. Sundheim.*

Published by Smith Edwards Company, Philadelphia.

2. *Vol. iv. of Mining Laws of British Empire.*

This volume deals with the Mining Laws of Canada and particularly those in British Columbia. It is a clear and reliable statement of the Laws as they have been enacted and are in force.

B.T.

OUR LONDON LETTER.

Judge Perry tells of a barrister noted for his wit who was escorting some ladies round a courthouse, when they came across the antique spears of the javelin men piled in a corner. "Whatever are those for?" asked a lady, gazing at them admiringly. "Those, my dear madam," replied counsel with prompt decision, "are used by the judge in the Crown Court when he charges the grand jury."

At the moment, the grand jury is being even more vigorously assailed on all sides, but is also not without valiant defenders. Professional opinion is sharply divided on the utility of the institution, while the lay newspapers have been strongly critical. The Grand Juries Suspension Act ceased to have effect from the 22nd December last, but an agitation at once began for the abolition of the system. Cases were recorded

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where twenty-three grand jurors and a petty jury assembled for the trial of one prisoner who pleaded guilty, or where sixty-two persons had been summoned for jury service, where the only charge was against two boys for the theft of chocolates, and they, too, pleaded guilty. In practical working many improvements are undoubtedly possible; but instances such as those cited are as forceful an argument against the petty jury as against the grand jury. The lay papers have, however, seized upon them as proof conclusive that the grand jury is expensive and useless. Assuredly no one should tolerate in the administration of justice inefficient machinery merely because of its antiquity, and if the grand jury system is to be abolished no time could be more fit than the present.

Many grand juries throughout the country have passed resolutions against the system, while a few have appealed for its retention. Lawyers like Sir Edward Marshall Hall and Sir Richard Muir, whose experience of all matters connected with criminal justice is very wide, differ on the subject. Lord Justice Bankes has condemned the grand jury at sessions (which are held at least four times a year in every borough and county) but has an open mind as regards assizes. Many other jurists of eminence have expressed an opinion on one side or the other. What began as an unreasoned outburst has crystallized into a serious discussion, and at present opinion in favour of the grand jury, although slow to make itself heard, seems likely to prevail.

The opponents of the system point out that the original function of the grand jury—to act as a public prosecutor—has long been obsolete. Much expense and inconvenience is occasioned, not only in respect of jurors but in respect of witnesses who must be brought to the assizes for the first time, although in the case of some of the large towns the cases in which they are to give evidence will not be reached until some days later. It is pointed out that while grand juries

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were suspended, justice did not suffer and the work of preliminary investigation is much better performed by experienced magistrates. Moreover, in modern conditions the newspaper is a sufficient guard against oppression by the executive, and in the Court of Criminal Appeal the prisoner has an adequate safeguard against a miscarriage of justice. Finally, it is said that all the grand jury does is to give a guilty man the chance of escaping justice without a trial.

The case on the other side, however, is supported by same weighty arguments. The grand jury is a check on wrongful commitments by magistrates; and while the layman remains on the bench some such check is needed. It is quite common for magistrates to commit on charges which the evidence does not support. The grand jury then on the direction of the judge finds a true bill on a charge which the evidence does support. In some cases, too, an innocent man is saved the disgrace of public trial. Mr. Justice Darling has had the records of the Oxford Circuit over a period of years examined. He found that about two per cent. of the prisoners were saved from trial by the grand jury finding no bill. That is a very large percentage and suggests that the grand jury has work of practical importance to do.

The whole subject was recently reviewed in "The Times" by "one of His Majesty's Judges." It is a fundamental principle of the common law that no subject shall be brought to trial by the act of the executive, and under the Suspension Act this principle was violated. For the grand jury was substituted committal by magistrates, or the written consent of a judge, the Attorney-General, or the Solicitor-General. So impudent were some of the executive's encroachments on the popular liberty during the war that no man would wish to give the government any increased power of ordering or preventing prosecutions and the Attorney-General and Solicitor-General are executive officials. Nor is a judge the proper official to initiate

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prosecutions. The executive can readily appoint criminal judges temporarily as commissioners of assize and, owing to the heavy King's Bench lists of recent years, many commissioners have from time to time been appointed for particular assizes. Moreover, even were there complete guarantees against executive influence a judge should not also act in the capacity of an accuser. The only possible alternative to the grand jury is, therefore, the committing magistrate. With a local bench, however, often composed largely of laymen, and drawn from a limited class of society, magisterial justice is not always ideal. At present refusal to commit is no bar to prosecution, though under the Vexatious Indictments Act a magistrate's inquiry, successful or unsuccessful, is in certain cases a condition precedent to prosecution. To make the prosecution depend on the result of the preliminary hearing would transfer to the magistrate's court the real legal struggle, and would have several other disadvantages. Probably the grand jury remains the most desirable and effective means available for the work. "One of His Majesty's Judges," however, would restrict the grand jury to the assizes, and professional opinion seems to be almost unanimous that such restriction is desirable.

Some interesting historical events have been recalled during the discussion. Mr. Justice Darling drew attention to the attempt of France to copy the system. When democracy was establishing itself during the Revolution, provision was made in 1719 that criminals should be brought to trial by a "jury of accusation" modelled on the grand jury. The autocracy of Napoleon ended the experiment, however, for in 1808 the code abolished the jury of accusation. The veteran criminal lawyer, Sir Harry Poland, has also recalled from his own experience two famous instances where the grand jury represented public opinion by throwing out the bill. Both cases arose out of the Jamaica Rebellion of 1865, which but for the prompt

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action of the executive might have assumed disastrous proportions. A committee of private prosecutors then started a campaign against Governor Eyre and other persons, preferring various charges; but the grand jury cut their activities short. One of the cases—*R.* v. *Nelson and Brand*—will be familiar to all constitutional lawyers for the very elaborate and illuminating exposition of martial law contained in the charge of Cockburn, C.J., to the grand jury.

Meanwhile important and overdue reforms in the administration of criminal justice are recommended by Mr. Justice Horridge's Committee on the detention in custody of prisoners committed for trial. The Committee suggest that magistrates should have power to commit a prisoner to the most convenient assize or sessions, having regard to the place and the time when trial would take place. Sessions (where the trial is conducted in boroughs by the Recorder—a practising barrister of experience, or elsewhere by a bench of magistrates) should be held more frequently, and many crimes now triable only at assize should be triable as well at sessions if more convenient. Finally the Committee urge that bail should be granted in every possible case where it can reasonably be done. It is to be hoped that speedy legislative effect will be given to the recommendations.

FRANK GAHAN.

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The Canadian Law Times.

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EDITORIAL.

Summer Issues.

As most of our Readers are, like the Editor, looking forward to some relaxation during that period called "long vacation," we do not think we need make any apology for the restriction in the size of the issues during July and August.

The Editor intends to be present at the Annual Meeting of the Canadian Bar Association to see what can be done in advancing to some action the immense variety of subjects discussed in the CANADIAN LAW TIMES during the year. To achieve anything co-operation is essential. To pioneer by discussing, expounding, and even exposing the wrongs and defects of the Law is wholly without beneficial result unless we awaken interest and create a spirit of co-operation. One man can do little. But the Canadian Bar by a co-operative effort could achieve great results in many much needed Legal Reforms discussed from time to time in the CANADIAN LAW TIMES.

Uniformity is a desirable aim; but what progress has been made in achieving it, I do not, so far, see. One subject which I have been discussing for some months is our Joint Stock Company Law; and it, above all others, urgently needs to be dealt with by the Commissioners on Uniformity.

To the Readers of the CANADIAN LAW TIMES we wish all the enjoyment and advantage of a real holiday—whether they scale the Mountains, or range the

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hills and vales, or lounge along the River Banks or upon the Ocean Strands, or skid on aeroplanes over the Prairie Plains or through the gorgeous scenery of the Rockies, or merely content themselves with spasmodic activities in driving a Golf Ball, through the gorse or over the heather or perhaps into one of the dried-up glut holes of the immense ocean which once occupied the present site of the Great Prairie Wheat Fields.

To all I say *Au Revoir.*

B. T.

Canadian Bar Association; Annual Meeting.

This will be the last issue of the CANADIAN LAW TIMES to reach our Readers before the Annual Meeting of the Canadian Bar Association. Most earnestly, therefore, do we urge every Barrister in Canada to be at Vancouver, B.C., on the 16th of August. If he responds, he is certain to go on to Victoria for the Meeting there on the 18th.

The Secretary of the Association deserves far more than mere perfunctory thanks and acknowledgments for the excellence of the arrangements made, and for the publicity he has managed to secure for this great assembly of the Erudition of the Law. I would almost describe it a conflux of juristic fame were it not that the expression might savor of hyperbole. But without the phrase at all, it is manifest that the Meeting will, in reality, be such a conflux —a flowing together of men eminent and pre-eminent in the Law from not only Our Mother Country, Great Britain, but from the United States, her most illustrious daughter who, however, since wedding herself to Republicanism is no longer of the Family but is still, nevertheless, devoted to the parental prestige and traditions in Jurisprudence;—also from France, that illustrious—I was going to say "matchless," but then I remember Ireland has that distinction—generator of jurists and advocates; and from Japan, the emulous Asiatic aspirant to the best conceptions in

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Law as in other matters of State, of the English-speaking Fraternity of Nations.

If the Meeting had nothing else to attract us the presence at it of the Right Hon. Lord Shaw representing the British, the Hon. J. W. Davis and Mr. C. A. Severance representing the American and M. Henri Aubepin representing the French Bars, would be sufficient incentive to attend. But there are matters of great moment to the Bar of every Province of Canada to be discussed, as the circular letters sent out by the Secretary clearly indicate; and the Provinces ought to be represented by men able to contribute to the discussions and worthy of the prestige and best traditions of the Bar. Besides the distinguished men I have named there will be an array of Jurists and forensic Orators from the United States and from the great centres of Canada; and I doubt not also from the British Isles—England, Ireland or Scotland.

We should avail ourselves of this great opportunity of meeting one another. There is no greater dispeller of illusions, and no surer welder of amity and goodwill, than the knowledge we gain of one another by personal contact. Let us avail ourselves of the opportunity presented by this great Annual Meeting—the greatest I believe Canada has ever had.

One word more: As Law is the tegument alike of the Nation and the Empire, so Lord Shaw, the illustrious representative of Law, should be accorded a warmth of welcome befitting this Dominion which is not only an aspirant to Nationhood but an ardent adherent of Empire. Canada's admiration of him is not mere adulation. He is a representative of our ultimate Court of Justice—a Court consisting of the Empire's greatest Jurists; and among them Lord Shaw's supereminent accomplishments have given him a place in the first rank of the Masterful Expositors of Our Law and Constitution.

These men we reverence rather than admire. At all events that is the sentiment awakened in the mind and heart of every man devoted to the cause of Can-

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ada's dawning greatness who surveys the work of the Privy Council and its beneficent influence on our Jurisprudence, especially since the days of Confederation 55 years ago.

B. T.

Company Law; Prerogative v. *Statute.*

The series of Articles on this subject by the Editor concludes by the one on *Prerogative* v. *Statutory Power* in this Issue. But we have sown seed on prolific soil; for we are in the happy position of being able to continue the solution of the complexities by a new series of Articles from the pen of Mr. H. G. Garrett, the Registrar of Joint Stock Companies, for the Province of British Columbia.

How far Mr. Garrett agrees with the Editor's views, remains to be seen. The first section of his series does not handle very closely the great question whether the Prerogative which is invoked by the Statute over-rides the Statute and dominates it, making *proprio vigore* the Corporation which it forms unamenable to the principle of *ultra vires* to which all Statutory Companies are amenable.

This really is the crucial issue; and the Appellate Court in Ontario has in *Edwards* v. *Blackmore* affirmed the Prerogative's dominance.

The King's Prerogative is, except for Executive Governmental acts, transferred to Parliament, or rather it is no longer exercisable by the King *solus* but by the King of Parliament. This is the fundamental meaning of the Revolution; and Coke is not an authority on such a question; for he lived before the Revolution had effaced the King's autocratic Prerogative as a Maker of Law affecting Civil Rights, and transferred it to Parliament where, since, it has been exercisable only with the consent of the Lords and Commons and in the form of a Legislative Act.

The *Sutton Hospital Case*, to-day, is a poor authority for the solution of the complexities relating to the

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powers and capacities of a hybrid Corporation constructed in every joint and sinew of it by Statute and merely vitalized by Royal Letters-Patent. The King *solus,* to-day, could not incorporate a mercantile limited-liability corporation by his Letters-Patent unless a Statute authorized him to do it.

Do the Letters-Patent merely vitalize the Company which the Statute constructs or do they in fact create a new entity of their own—an entity which possesses all the powers and capacities of the Common Law Corporation except so far as they are expressly and negatively prohibited to it? That is the question. I have faced it and dealt with it straight from my view point; and I expect others who take part in the expository discussion in the CANADIAN LAW TIMES to do the same, whether they agree or disagree with what I have said,—namely, that the Prerogative to-day for the purpose of the incorporation of Mercantile and Commercial Corporations is essentially, and only, an instrument of the Statute, and it cannot over-ride any of the limitations, restrictions, or restraints, whether they are negative or not, made by the Statute upon the Corporate Body which the Prerogative merely calls into existence. In other words: The Prerogative for Law Making purposes is in abeyance, unless when, and so far as, an Enactment of Parliament calls it into life or activity. Then it subserves the Enactment; and in vitalizing a Corporation it cannot endue the creature with any power higher than, or different from, the power ascribed to, or conferred upon, the creature by the moulding Enactment itself, or higher than, or different from, what the creature would have had if it had been vitalized entirely within the provisions of the Enactment. To hold otherwise is to hold that the Prerogative power of the King is still dominant while, as a fact, we know it has been subordinated to, if not absolutely merged in, Parliament ever since the Revolution.

The Statute 7 Wm. IV. & 1 Vict. Cap. 73 to which Mr. Garrett refers in his Article was undoubtedly the

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parent of the Companies Acts not only in the United Kingdom but in all the Dominions. The idea had not in 1837 fully matured of incorporating by Act of Parliament or by registration of certain constituent documents pursuant to an Act of Parliament. Incorporation then was effected by Prerogative Letters Patent, but they created a Common Law Corporation. This was not what Mercantile Companies wanted; and so the Statute referred to was enacted to "authorize the King to issue Letters-Patent to any Company or Body for trading or other purposes, *although not incorporated by such Letters Patent* conferring any privilege which it would be competent to grant to any Company or Body incorporated by Charter of incorporation." (Section 2).

This Act gave the Company or Body power to sue and be sued, and made the Members liable for its obligations; and, most important of all, it required the Members to execute a regular Partnership Deed. The Company or Body, under the Act, was essentially a Partnership though it had something akin to a Corporate name and to corporate powers.

Incorporation was not not only essential, but it was to obviate incorporation the Act was passed.

It was, as Mr. Garrett suggests, open to the Company or Body to incorporate or not. If it abstained from incorporation, it was a Partnership governed by its Deed and it could not contract obligations outside the orbit there prescribed for it, any more than can an ordinary Partnership to-day. It was limited by the principle of *ultra vires* just as we know it in Corporate Companies. If it got incorporated by Letters-Patent subsequent, did the provisions of the Act cease, and did the erstwhile Partnership become a Common Law Corporation with all its status, attributes and incidents? The question answers itself. Even absurdity could not say yes.

Lord Atkinson, in the case cited, says the House of Lords revolts at absurdities; and surely no greater absurdity was ever presented than the proposition—or

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legal decision as we have it in *Edwards* v. *Blackmore* —that our Statutory Joint Stock, limited-liability Companies are Common Law Corporations, merely because the grotesque anachronism is maintained by the Dominion, Quebec, Ontario, New Brunswick and Manitoba of calling them into existence by a Letters-Patent Charter issued not automatically but pursuant to Legislative Enactments.

It is with much pride and satisfaction I find, just as I am writing this Article, that the Court of Appeal of Saskatchewan has already revolted against the absurdity referred to, and has reversed *Bank of Commerce* v. *Cudworth* which followed *Edwards* v. *Blackmore*. Vide Notation of Notable Cases *post*.

B. T.

Law and Literature.

Viscount Haldane is the author of a Book just published on the "Philosophy of Humanism"; and the announcement of the fact strikes a note in my mind which I will try to transmit to my readers. The Note is this: Why is the art of expressing in writing legal conceptions or the arguments by which these conceptions are brought to the comprehension of others so largely contemned among the Legal Profession in Canada?

To say that a practising barrister has written a book or even a number of Articles in a Law Magazine is, in Canada, equivalent to grading him as inept, inefficient and unpractical—a theorist, a philosophiser and a dreamer of dreams. It is most unjust; but it is so. Yet it is not the injustice I am thinking of now, but the attitude of mind which constrains, or permits, one barrister to make such an irrational estimate of another.

What can be its cause? Have the lawyers in Canada lost the perception or apprehension of the great potentials of their profession—potentials not so much of acquiring a competence in wealth as of achieving great results for the Common-Weal?

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Does the Canadian Lawyer forget that it was men like Cicero and Edmond Burke who through the ages have guided their countries in their darkest hours between the Scylla and Charybdis of intriguery, faction, and conflicting policies; and that both Cicero and Burke were Lawyers who, though unmatched in the world to-day as Orators, where first of all Writers? Read their lives and see, and not only see but learn that it was on their literary skill they constructed their sublime Orations. They were both Constitutional Lawyers in the highest and truest sense; and their writings are not less famous, nor to us less precious, than their speeches.

Why should we—most of us mental pygmies by comparison—despise what Cicero and Burke used as an instrument of their greatness—the art, namely, of committing their views to writing?

It takes an opinion on any subject to be worth something to bear the test of writing it and then of a critical examination of the writing with a pruning hook in one hand and an axe in the other so that the rotten parts may fall and the efflorescences may be trimmed to a relative and exact proportion. Both Cicero and Burke submitted their great speeches to this process.

All through the years since the Reformation it has been the proud boast of the Bars of England, Ireland, and Scotland that the men who have attained the greatest distinction as advocates and lawyers were happy possessors of the literary talent; and in the stresses of their avocations they have constantly found time and opportunity to give, by way of Books or Magazine Articles, expositions not only of the great controversies of the period in which they lived but of subjects far separated from them—subjects relating to mental, moral, and physical science; to history; to the germination of our race and of our Empire; and to the thousand and one things to which exclusive literary men devote their lives. While they did this they lost no caste among their compeers as Lawyers,

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but on the contrary they added to themselves a new lustre. And then how many of them have given us Books on Law itself—books which even cast in the shade their fame, unmatched in their own time, as advocates and as forensic Orators!!

And here we have Lord Haldane in the zenith of greatness, and, I should think, one of the busiest Judicial Functionaries in the World—as a Member of the Privy Council and of the Judicial Committee, producing for us a Book on the "Philosophy of Humanism." Who that has ever appeared before him will say that he is an unpractical man? His judgments prove that he is alert to every phrase of every proposition put before him whether from a Legal or Commercial or other aspect.

His Book is the last refutation of the slanderous attitude of mind to which I have been referring. Let it cease; for it is more of a slander on the Profession itself than on the particular Lawyer against whom for the time it is levelled.

The art of expressing in writing the mind of a man in clear, precise, and adequate language is the noblest of all arts. It is an acquired art, though, like Oratory, the elemental qualities or powers are innate. It is an art known to the mere empiric or the sophist or the specious parader of generalities; but it is an art which appertains to every great Lawyer and every great Advocate, though if he also possesses the corresponding art of oral expression he may in the fullness of years gradually discard the use of one and exclusively rely on the other.

B. T.

Taxation Exemptions.

The Article on the legality of the Enactments by the Dominion Parliament establishing Exemptions from Taxation by the Western Provinces of the C.P.R., its *soi-disant* land, and its railway system, which was announced for this issue, has been deferred till August.

B. T.

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COMPANIES AND DOMINION AND PROVINCIAL LAWS.

By H. G. Garrett, Victoria, B.C.

The various decisions of the Privy Council in recent years as to companies, their powers, rights and so forth, have shed much light on the extent of jurisdiction possessed by the Dominion and the Provinces, and the effect of legislation which has been enacted. They will prove memorable milestones along the road to a final solution of the problems involved. But these very cases in laying down broad principles and apparently unravelling some knotty point, by a strange irony seem simultaneously to raise fresh questions equally complicated and controversial. As a result one cannot say that the boundaries of the dual jurisdiction are yet so clearly defined as to make the legislator feel confident that he is not enacting measures which are *ultra vires* or, on the other hand, that the precise effect of the systems of company law now in force in Canada is so evident that a lawyer can rest assured he is giving a client sound advice. That is the purely legal aspect and manifestly unsatisfactory. From the standpoint of the business man and the investor the matter, even though it may not be fully realized, is worse. The truth will out and the state of confusion and uncertainty already existing will become more and more intensified, until the Legislatures will be forced to take action.

The settlement of the constitutional aspect of the question is quite capable of a compromise, fair to both the Dominion and the Provinces, but the difficulties are unfortunately increased by the tendency of these Governments to encroach on each other's preserves, under the pressure of commercial interests or from other motives. Only a determined public opinion can bring about the desirable peace without victory, and that is my excuse for venturing on these intricate

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waters, in the hope that frequent publications on this question may assist in crystallising the various ideas which are prevalent. The judgments referred to have not, I venture to say, been fully apprehended or rightly construed—indeed, in some quarters certain principles enunciated are regarded as revolutionary. My scheme is to summarise those and other cases and distribute the subject under its separate heads—a plan far easier to design than to execute—so as to present as clear an outline, if possible, of the situation as it prevails to-day. The inherent defects of such a method are, I humbly confess, enhanced by the risk of apparently selecting passages for the purpose of proving a theory—to which I plead that to the best of my ability I have endeavoured to present an impartial review. If this article serves in any way to focus on this question the large body of dissatisfied opinion which undoubtedly exists, I shall feel amply rewarded for my pains. The surgeon's knife in the shape of amendment to the British North America Act may prove necessary, but the issue is bigger than that and grows ever more important.

In outline the design is to treat the question under the following heads:

(1) Principles of construction of the B. N. A. Act (for the purposes of this article).
(2) Power to incorporate companies.
(3) Method and effects of incorporation.
(4) Status and capacity of companies.
(5) Powers of companies.
(6) Rights of companies.
(7) Power to alter, enlarge, etc., the powers of companies.
(8) Power to dissolve companies.
(9) Power to prohibit companies.
(10) Power to regulate companies.
(11) Power to tax companies.
(12) Powers as to foreign companies.
(13) Acquiescence in jurisdiction.

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(1) PRINCIPLES OF CONSTRUCTION OF THE B. N. A. ACT.

(*a*) "Whatever belongs to self-government in Canada belongs to the Dominion or the Provinces within the limits of the B. N. A. Act."[1]

(*b*) "Within the spheres allotted to them by the B. N. A. Act the Dominion and the Provinces are rendered on general principle co-ordinate Governments. As a consequence, where one has legislative power, the other has not, speaking broadly, the capacity to pass laws, which will interfere with its exercise."[2]

(*c*) ". . . if the subject matter also falls within any of the enumerated heads of sec. 91, then it cannot be treated as covered by any of those in sec. 92." This principle applying "to the whole of the sixteen heads in sec. 92."[3]

(*d*) "General language in the heads of sec. 92 yields to particular expressions in sec. 91, where the latter are unambiguous. The rule may also apply in favour of the provinces in construing merely general words in the enumerated heads of sec. 91."[4]

At page 118 of that case the regulation of trade and commerce is described as a "purely general enumerated head."

(*e*) "The general authority to make laws for the peace, order and good government of Canada (under sec. 91), does not, unless the subject-matter falls within some of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters entrusted to the provincial legislatures by the enumeration in sec. 92."[5]

(*f*) "The principle is now well established, but none the less ought to be applied only with great caution, that subjects which in one aspect and for one purpose fall within the jurisdiction of the provincial legislatures may in another aspect and for another purpose fall within the Dominion legislative jurisdiction."[6]

(*g*) "The effect of the concluding words of sec. 91 is to make the exercise of the capacity of the Dominion Parliament

[1] *A.-G. for Ontario* v. *A.-G. for Canada* (1912), A. C. 571.
[2] *Great West Saddlery Co.* v. *The King* (1921), 2 A. C. 100.
[3] *Ibid.*, p. 99.
[4] *Ibid.*, p. 116.
[5] Insurance Reference: *A.-G. for Canada* v. *A.-G. for Alberta* (1916), A. C. 590.
[6] *Ibid.*, p. 596.

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> (Sc. to incorporate companies with Dominion-wide powers), prevail in case of conflict over the exercise by the provincial legislatures of their capacities under the enumerated heads of sec. 92."[7]

This is a hard saying, "The concluding words of sec. 91," refer to the enumerated heads of secs. 91 and 92. Interpreted literally in favour of Dominion Companies, the passage would mean, for example, that any regulation of trade under head 2 of sec. 91 could override any enumerated head of sec. 92. Such a construction, however, as will be seen, is inconsistent with several other passages cited later, and it is submitted that the principle laid down is only applicable *ad subjectam materiam.*

Then as to the effect of an *ultra vires* provision in a statute—

> (*h*) "If there be a provision (*e.g.*, of the character of mortmain), occurring even in a statute which in other respects is *ultra vires*, and that provision be severable, it is valid."[8]

A word or two as to "indirect" legislation may not be out of place.

> (*i*) "What cannot be done directly cannot be done indirectly."[9]
>
> "This is a principle which has to be kept closely in view in testing the validity of . . . legislation under consideration."[10]
>
> "Legislation the validity of which has to be tested must be scrutinised in its entirety in order to determine its true character."[11]
>
> "Neither the Parliament of Canada nor the provincial legislatures have authority under the B. N. A. Act to nullify, by implication, any more than expressly, statutes which they could not enact."[12]

The point here involved was definitely raised in the various cases turning on legislation concerning com-

[7] *G. W. Saddlery Case, ubi supra*, p. 115.
[8] *Ibid.*, p. 119.
[9] *Ibid.*, p. 101.
[10] *Ibid.*, pp. 100, 121.
[11] *Ibid.*, p. 117.
[12] *Ibid.* p. 117.

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panies. It is likewise an issue between the Dominion and the Provinces as to the extent of their jurisdiction over the business of insurance and insurance companies. The extract next cited has an obvious bearing on the amendments to the Criminal Code touching the business of insurance. As an instance of invalid "indirect" legislation, it was stated in the case, testing the validity of the Board of Commerce Act and Combines and Fair Prices Act, that it is *ultra vires* the Dominion—

"To attempt to interfere with a class of subject committed exclusively to the provincial legislatures, and then to justify this by enacting ancillary provisions designated as new phases of Dominion Criminal Law, which require a title to so interfere as a basis of their application."[13]

This type of legislation is legislation which is not "properly framed.[14]

(2) POWER TO INCORPORATE COMPANIES.

Dominion Exclusive Powers.

The exclusive powers of the Dominion to incorporate companies for any purpose of the specific heads in sec. 91 of the B. N. A. Act have not and cannot be questioned. The point has only arisen where the company was established to carry on an undertaking which extends beyond the limits of a single province, and is accordingly taken out of sec. 92(10) and transferred to the enumerated class of subjects in sec. 91. In general there should be no doubt as to undertakings of this kind, and the authority is established by the *Bell Telephone Case*.[15] But the judgment in the *Compagnie Hydraulique Co. Case*[16] does raise difficulties and has been severely criticised. It is there stated that:

"Where as here a given field of legislation is within the competence both of the Parliament of Canada and of the provincial

[13] *In re Board of Commerce Act and Combines and Fair Prices Act* (1922), A. C. 191.

[14] Insurance Reference, *ubi supra*, p. 597.

[15] *Toronto* v. *Bell Telephone Co.* (1905), A. C. 52.

[16] *La Compagnie Hydraulique* v. *Continental Heat & Light Co.* (1919), A. C. 194, 198.

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legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the province, if the two are in conflict, as they clearly are in the present case."

The Dominion company had the general powers indicated by its name, but its Act of incorporation specified no particular undertaking, although it clearly contemplated business in more than one Province. The Provincial company was a later creation and its Act purported to confer on it exclusive privileges in a certain locality, where in fact the Dominion company also commenced operations. It is submitted that the decision is sound for these reasons. The undertaking of the Dominion company is within the genus of sec. 92 (10-a-c), neither a telephone nor a light or power company undertaking is mentioned there, but both may clearly extend beyond the limits of a similar province. There is nothing in sec. 92 (10) which requires the undertaking to be a specific undertaking. The undertaking of the Dominion company authorised must be regarded as "one single undertaking" and

"The failure or neglect to put into effect all the powers given by the Legislative authority afford no ground for questioning the original jurisdiction."[17]

and therefore

"No provincial legislatures was or is competent to interfere with its operations as authorised by the Parliament of Canada."[18]

The case is an unpleasant one for the provinces to swallow and an extreme example of the exercise of Dominion powers under sec. 92 (10-a-c). It is on a par with the violent exercise of the power to declare any work to be for the general advantage of Canada.

DOMINION GENERAL POWERS.

As a deduction from principles (*a*) and (*b*) of construction (p. 468) it has been held that while sec. 92(11) is specific as to Provincial companies there is no

[17] *Toronto* v. *Bell Telephone*, *ubi supra*, pp. 59, 58.
[18] *Ibid*, p. 57.

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"gap" or "hiatus" in the B. N. A. Act in respect of a power to incorporate Dominion companies.

"The power is covered by the general enabling words of sec. 91, which confer it exclusive on the Dominion."[19]

"The power of legislating with reference to the incorporation of companies with other provincial objects must belong exclusively to the Dominion Parliament, for the matter is one not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces . . . and may be properly regarded as a matter affecting the Dominion generally, and covered by the expression 'the peace, order and good government of Canada.'"[20]

In the same case the Dominion Companies Act and sec. 30 of the Interpretation Act defining "company" were held to be valid legislation.

In the *Insurance Reference Case* it was said that the Dominion Government can incorporate a company to carry on business throughout Canada with "rights and powers to that effect operative apart from further authority"[21]; the meaning of these words is dealt with later.

In view of the specific jurisdiction conferred on the provinces to incorporate companies having provincial objects only, it would have been politic and in the interests of harmony for the Dominion to have refrained from exercising its wider powers except in proper cases. It is notorious, however, that the reverse is the truth. Duff, J., speaks of "the habitual abuse of the Dominion power of incorporating companies," and adds, "a Dominion charter is given to those who seek it without any inquiry whether the intention is to carry on business in more than one province or not."[22]

Whatever the effect on constitutional relations, the effect in law has been very plainly stated thus:

"The fact that the Association has hitherto thought fit to confine the exercise of its powers to one province cannot affect its

[19] *G. W. Saddlery Case, ubi supra*, p. 114.
[20] *John Deere Plow Co.* v. *Wharton* (1915), A. C. 340.
[21] Insurance Reference, *ubi supra*, p. 597.
[22] Companies Reference, 48 S. C. R., at p. 425.

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status or capacity as a corporation . . . and the fact that the exercise of its powers has not been co-extensive with the grant cannot operate to repeal the Act of Incorporation, nor warrant the judgment prayed for, viz: that the company may be declared to be illegally constituted."[23]

—namely, on the ground that the business of the company was a purely local concern and never intended to be otherwise.

PROVINCIAL POWERS.

The Provinces have no exclusive powers in the same sense as the Dominion has, that is, in respect of certain classes of business or undertakings, such as banks or constitutional railways. That is the effect of the interpretation of the words "with provincial objects" as having a geographical import and not a meaning referable to the subject-matters in sec. 92 over which the Provinces have legislative authority. The latter construction has had staunch adherents, but must now be abandoned, as the principle has been laid down. In the *Companies Reference Case* the first question embodied this difference of views:

"Q. 1—What is the meaning of the expression 'with provincial objects' in sec. 92, Article 11, of the B. N. A. Act? Is the limitation thereby defined territorial, or does it have regard to the character of the powers, which may be conferred upon companies locally incorporated, or what otherwise is the intention and effect of the said limitation?"

The answer is covered by the following passages:

"Section 92 confers exclusive power upon the provincial legislature to make laws in relation to the incorporation of companies with provincial objects."[24]

(Under No. 11 of sec. 92) "the incorporation of companies with provincial objects cannot extend to a company (incorporated by the Dominion), the objects of which are not provincial."[25]

That is, "the objects of which extend to the entire Dominion."[25]

[23] *Colonial Building and Investment Association* v. *A.-G. for Quebec*, 9 App. Cas. 165.
[24] *Bonanza Creek Gold Mining Co.* v. *The King* (1916), 1 A. C. 577.
[25] *John Deere Plow Co. Case, ubi supra*, pp. 339, 340.

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"For the power of a province to legislate for the incorporation of companies is limited to companies with provincial objects, and there is no express power to incorporate companies to carry on business throughout the Dominion and in every province."[14]

There is, accordingly, no exclusive power in reality. While the Provinces have sole authority over local undertakings under sec. 92 (10), a company incorporated for such a purpose is in fact on the same footing as a company incorporated to carry on a real estate business, because its privileges can as it were be overridden by the incorporation of a Dominion or pseudo-Dominion company to carry on a Dominion-wide undertaking. So, too, the Dominion endeavours to give a superior status to its creations under its general powers, although they may be mere village companies, and in that way encroaches on the constitutional preserves of the Provinces.

(3) METHODS AND EFFECTS OF INCORPORATION.

Three methods of incorporation are in use to-day in Canada—(1) By special Act of the Legislature; (2) By Letters Patent under the Great Seal of the Governor-General or Lieutenant-Governor or the Seal of an officer of the Government, such as the Secretary of State; and (3) By certificate of incorporation or registration. In British Columbia, Alberta, Saskatchewan, Nova Scotia and the Yukon the second system is not employed, but is authorised under the Companies Acts of the Dominion, Ontario, Manitoba, Quebec and New Brunswick. The differences may, perhaps, be summarised in this way, that a special Act is passed in the same way as other Acts—Letters Patent are granted on application pursuant to the terms of a statute, but at the discretion of the executive authority charged with the duty to entertain the application—a certificate of incorporation or registration is a matter of right upon compliance with cer-

[14] *Great West Saddlery Co. Case, ubi supra*, p. 114.

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tain formalities. In every case a corporation is erected with certain incidents in common, such as the power to sue and be sued, to contract in its corporate name, to acquire and hold property, etc., derived either from the special or general Companies Act or an Act of Interpretation. But the status and capacity bestowed on the corporation vary according to the system of incorporation and the Government by which it is established. Wrapped up with this question of status and capacity is the matter of powers and the applicability to the particular corporation of the doctrine of *ultra vires,* and also the extra-provincial "vitality" of the corporation. An attempt is made later on in this article to deal with status, capacity, powers and rights.

The position of companies formed under a special Act or a general Act providing for registration of a memorandum of association was prior to the *Bonanza Case* comparatively free from doubts, and the companies having "charters" were placed in the same category. But the prevailing methods of incorporation by letters patent received in that case a construction which fell like a bombshell on legal circles in Canada and has been scathingly criticised by eminent members of the profession.[27] There is no doubt that its results create grave dangers for investors and creditors of commercial companies. It is unfortunate that some of the Provinces have made confusion worse confounded by essaying to confer on the other classes of company the legal incidents which the *Bonanza Case* attaches to companies of the letters patent type.

In view of the comments on that part of the judgment in the *Bonanza Case* to which I have referred, I will first cite some passages as to the form of the statutes in question and then add some observations. The crux of the matter is the ancient prerogative power to incorporate by charter, its transmission to the representatives of the Crown in Canada, the

[27] See for example C. L. T., Vol. 36, pp. 679, 769, J. S. Ewart, K.C.

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modification of that power by legislative enactment and the results of such action.

"The provisions of the British North America Act nowhere profess to curtail in any respect the rights and privileges of the Crown or to disturb the relations then subsisting between the Sovereign and the Provinces."[28]

"There can be no doubt that prior to 1867 the Governor-General was for many purposes entrusted with the exercise of the prerogative power of the Sovereign to incorporate companies throughout Canada, and such prerogative power to that extent became, after Confederation and so far as provincial objects required its exercise, vested in the Lieutenant-Governors . . ."[29]

This statement has been controverted by Mr. Ewart on historical grounds, but it should in any case be read with principles (*a*) and (*b*) cited on page 468.

A Lieutenant-Governor is "as much the representative of Her Majesty for all purposes of provincial Government, as the Governor-General himself is for all purposes of Dominion Government."[30]

"In such a case as that of a self-governing Dominion like Canada," the principle of *Musgrave* v. *Pulido*, 5 A. C. 102, finds "its analogy in the terms not only of the commission, but of the *statute creating the constitution*" and that is "the measure of his executive authority to-day."[31]

The principle referred to is that the authority of a colonial Governor is restricted to the terms of his commission and any instructions which accompany it. It should be noted that in the *Bonanza Case* their Lordships expressly guarded themselves against holding that all Royal prerogatives, except such as are reserved expressly or by implication, have passed to the Governor-General and Lieutenant-Governors respectively, so as to constitute them quasi-Viceroys. On the other hand, they say that some of these powers have passed under the British North America Act and others may have passed by implication, and to that extent the Crown is bound. A phase of this is dealt with under "capacity."

[28] *Liquidators of Maritime Bank* v. *Receiver-General of N. B.* (1892), A. C. 443.
[29] *Bonanza Creek Case*, *ubi supra*, p. 580.
[30] *Liquidators of Maritime Bank, etc.*, *ubi supra*, p. 437.
[31] *Bonanza Creek Case*, p. 586.

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In discussing this prerogative power and its control by statute, Lord Haldane says—

"The statute may be so framed that executive power to incorporate by charter independently of the statute itself, which some authority, such as a Lieutenant-Governor, possessed before it came into operation, has been left intact."

or

"The statute may be in such a form that a new power to incorporate by charter has been created."[32]

Then, speaking of the Dominion and Ontario Companies Acts, he says—

"Subject to the express restrictions in the statute, it is by the grant under the Great Seal and not by the words of the statute, which merely restrict the cases in which such a grant can be made that the vitality of the corporation is to be measured."[33]

Thus it is manifest that the prerogative power can be curtailed. Now the construction placed on the Dominion and similar Acts repealed or in force in Canada has been regarded as novel and almost absurd. But it must be remembered that exactly the same system at one time prevailed in England before the liberal method of incorporation at will by mere registration was adopted as more in harmony with modern conditions. It was, then, with a knowledge of those ancient laws and the decisions about such companies that the Privy Council enunciated these revolutionary ideas. Let anyone who is sufficiently interested turn up the Letters Patent Act—7 W. 4 and 1 V., ch. 73 and the Banking Companies Act, 7 & 8 V. ch. 113. The latter Act contains, for instance, a provision prohibiting the commencement of business until a prescribed amount of capital has been subscribed, just as the Canadian Acts do to-day. The case of the *Eastern Archipelago Co.*[34] held that a breach of that condition "was an abuse of its charter which worked a forfeiture." Then take the case of *Rendall* v. *Crystal Palace*

[32] *Ibid.*, p. 578.
[33] *Ibid.*, p. 583.
[34] *Eastern Archipelago* v. *The Queen*, 2 E. & B. 856.

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Co.,[35] where the Company held a charter expressed to be granted for purposes mentioned, but subject nevertheless to the conditions, restrictions, regulations and provisions therein contained, and it was decided that a breach of a condition—to wit, that no person should be admitted on a Sunday—would occasion a forfeiture.

The law is ancient law with settled principles and not invented to subvert the law of companies in Canada, where unwittingly an antiquated system has been perpetuated. Being ancient law, the consequences must attach and be faced, as will be seen when we come to the question of capacity.

Before quitting this branch of the subject there are two points I desire to emphasize, although I almost apalogize for doing so, as both are obvious. The first is that under the letters patent system, every grant, original or subsequent, made to a company, is a pure matter of discretion with the executive authority, that is, in strict law. The other is that every company, howsoever created, is a person in the eye of the law, and therefore becomes a subject of the Dominion and the Provinces to the same extent as a natural person. A Dominion company is not a curious kind of privileged creature, but just a juristic person and as such amenable to law.

(4) STATUS AND CAPACITY OF COMPANIES.

Although a refined student of jurisprudence would doubtless object to the collocation of "status" and "capacity" under the same heading, the notions involved appear to be so intertwined that their use together will not, perhaps, confuse for our present purposes. This branch of my subject has as its two main aspects the intra and extra-Canadian territorial jurisdiction and the form and effects of the constitution of the company. A few quotations from textbooks will serve to clear the air.

[35] 27 L. J. (Ch. 397), 4 K. & T. 326.

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"Law is concerned only with the legal aspect of personality, the capacity of being a subject of rights."[36]

"Every person has a certain civil status, consisting of his capacity for the acquisition and exercise of legal rights and the performance of legal acts. From the nature of status, it is apparent that the term is a relative one, varying, according to the laws of different communities."[37]

"A corporation is a legal *persona* just as much as an individual."[38]

"Juristic persons are such groups of human being as are in the eye of the law capable of rights and liabilities, in other words to which the law gives a status."[39]

"A corporation" is a collection of many individuals united in one body, under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights . . ."[40]

"The capacity of a corporation to enter into any legal transactions is governed both by the constitution of the corporation and by the law of the country where the transaction occurs."[41]

The status and capacity of companies established by a special Act or under a general Act of incorporation was fairly plain sailing so far as the country of creation is concerned. The doctrine laid down in *Ashbury Railway Co.* v. *Riche*[42] has settled the position of "statutory" companies. Mr. Bram Thompson, the able Editor of the CANADIAN LAW TIMES, puts it very concisely thus—

"For the Statutory Company its objects or business, its powers and capacities are all prescribed and circumscribed by the Statute. Anything done outside the ambit of the Statutory authority is *ultra vires*. Within the Statute the company is *sui juris* and *compos*; outside the orbit of the Statute it is void of power, equally void of capacity, and utterly *non compos*."[43]

[36] Young, Foreign Corporations and other Companies, p. 51.
[37] Dicey, Conflict of Laws (2nd ed.), p. 458.
[38] Halsbury, Laws of England, Vol. 8, p. 302.
[39] Holland, Jurisprudence (12th ed.), p. 97.
[40] 1 Kyd. 13, quoted in Brice, *Ultra Vires* (3rd ed.), p. 1.
[41] Dicey, *ubi supra*, p. 469.
[42] L. R. 7 H. L. 653.
[43] C. L. T. Vol. 42, p. 247.

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But the different position of companies incorporated by letters patent,—"prerogative" or "chartered" companies, is not so clearly appreciated. The *Bonanza Case* makes it clear. On the other hand, the amending Acts subsequently passed by several provinces have only served to mystify us by the attempt to convert "statutory" companies into hybrid "prerogative" companies.

The *Bonanza Case* contains these observations, which apply alike to Dominion and Provincial companies, when incorporated in the manner mentioned.

"A company incorporated by the statutory Memorandum of Association . . . can have no legal existence beyond such as is required for the particular objects of incorporation to which that Memorandum limited it.

A similar rule has been laid down as regards companies created by special Act."[44]

It is wrong "to start by assuming that the legislature meant to create a company with a capacity resembling that of a natural person, such as a corporation created by charter would have at common law."[45]

"Such a creature, where its entire existence is derived from the statute, will have the incidents which the common law would attach, if, but *only* if, the statute has by its language gone on to attach them."[46]

The famous case of *Sutton's Hospital* and Lord Coke's annotation of it are responsible for the unique position which the "chartered" company holds in the eye of the Law. Brice[46a] makes this comment on the case—

"Blackstone adds that common law corporations may 'do all others Acts as natural persons may.' This statement is manifestly misleading." He then cites examples of disabilities and adds that that was Lord Coke's own statement and not warranted by his authorities. However that may be, the doctrine is

[44] *Bonanza Case, ubi supra*, p. 577.
[45] *Ibid.*
[46] *Ultra vires*, p. 4.
[46a] *Ultra vires*, p. 4.

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firmly rooted and, in short, is that a common law or chartered company resembles a natural person as closely as legal fiction permits. Lord Coke himself says—

"When a corporation is duly created, all other incidents are tacitly annexed . . . therefore divers clauses in the charters are only declaratory and might well have been left out, as to purchase, sue, be sued, have a seal . . . To *restrain them* from aliening or demising but in certain form, that is an ordinance testifying to the King's desire, but it is but a precept, and *doth not bind in law.*"[47]

The *Bonanza Case* deals minutely with the "chartered" type of company found in Canada to-day.

"The charter conferred on the company (sc. Bonanza Creek Gold Mining Co.) a status resembling that of a corporation at common law, *subject* to the restrictions which are imposed on its proceedings."[48]

"It is by the exercise of the executive power of the Sovereign that the Company is brought into existence.

It is by the grant under the Great Seal and not by the words of the statute that the vitality of the corporation is to be measured."[49]

That is to say, this particular company is a common law company, made subject to restrictions, in the same way as English companies under the Act of 7 and 8 Vict., cited above. But it is open to the legislatures to frame other enactments, to attach conditions to the prerogative power of incorporation and to state, if they please, what kind of company may be created.

"The language (of the statute) may be such as to show an intention to confer on the corporation the general capacity, which the common law ordinarily attaches to corporations created by charter."[50]

"The question is simply one of interpretation of the words used. Where the Act provides that the corporation shall be 'capable of exercising all the functions of an incorporated company *as if incorporated by a special Act of Parliament*,' the provision is construed as an enabling one and not as intended to restrict the existence of the company to what can be found in the words of the Act as distinguished from the letters patent."[51]

[47] 10 Coke, 1 E. R. 77, 970.
[48] *Bonanza Case, ubi supra*, 582.
[49] *Ibid.*, p. 583.
[50] *Ibid.*, p. 578.
[51] *Ibid.*, p. 582.

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The words in italics are to my mind most perplexing. What did the legislature mean when it enacted them? One can feel sure that there was no thought of the vast gulf of distinction between "chartered" and "statutory" companies. Were they intended to confer some special right or privilege, and, if so, what? They refer to the exercise of "functions." Then the interpretation placed on them by Lord Haldane's words does not elucidate the conundrum. If a "common law" company is by force of legal doctrine in a superior position to a "statutory" company, how do the words "enable," unless some special right or privilege attaches? It is, perhaps, unfortunate that the interpretation of this provision was not strained (if that is the proper word to use) so as to bring companies incorporated under such legislation into the category of "statutory" companies, as if the intention of the Statute was to subject them to the *ultra vires* and not the "natural person" doctrine. After all the words used are "capable of, etc.," and so treat of capacity. But as the judgment stands, the grant under the Great Seal governs.

A passage quoted above states that the *Bonanza Creek Gold Mining Co.* was established by virtue of the prerogative power. As to the existence of this power under the present constitutions of the Provinces Lord Haldane says—

> The words of No. 11 of sec. 92 "do not preclude the province from keeping alive the power of the executive to incorporate by charter in a fashion which confers a general capacity analogus to that of a natural person. Nor do they appear to preclude the province from *legislating* so as to create by or by virtue of statute a corporation with this general capacity."[83]
>
> "The Ontario legislature has not thought fit to restrict the exercise by the Lieutenant-Governor of the prerogative power to incorporate by Letters Patent."[83]

Masten, J., raised an interesting point in the *Weyburn Case*[84] as to whether the prerogative power

[83] *Bonanza Case, ubi supra*, 584.
[83] *Ibid.*, p. 585.
[84] *Weyburn Townsite* v. *Honsberger*, 43 O. L. R. 451, at p. 465.

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existed in the provinces carved out of the North-West Territory to the same extent as in the pre-Confederation provinces. He did not, however, pronounce any opinion.

We have so far dealt with capacity and status only from the viewpoint of its domestic ambit. The *raison d'etre* of the *Bonanza Case* was whether a provincial creation could travel beyond the boundaries of its parent province. In the Companies Reference, question 2 was this—

"Has a company incorporated by a provincial legislature under the powers conferred in that behalf by sec. 92, Article 11, of the B. N. A. Act, power or capacity to do business outside the limits of the incorporating province? If so, to what extent and for what purpose?"

Consistently with their policy of refraining from answering abstract questions, their Lordships merely remark that this question has been "answered as sufficiently as is expedient in the *Bonanza Creek Case.*" We must, therefore, turn to that beacon for guidance.

"The words of sec. 92 are wide enough to enable the legislature of the province to keep the power alive, if there *existed* in the executive at the time of Confederation a power to incorporate companies with provincial objects, but with an ambit of vitality wider than that of the geographical limits of the province . . . It is therefore important to ascertain what were the powers in this regard of a Lieutenant-Governor before the B. N. A. Act passed . . ."[55]

The words of No. 11 of sec. 92 "really . . . preclude the grant . . . of powers and rights in respect of objects outside the province, while leaving untouched the ability of the corporation . . . to accept such rights and powers if granted *ab extra.*"[56]

The word "existed," which I have italicised, is significant and appears to imply that the older have larger powers in this regard than the younger provinces. It may be inferred from the passages cited *ante* as to the prerogative power, that the older provinces still possess the power to confer on a company an extra-territorial ambit of vitality—that is, the status and capacity to pass beyond the limits of the Province and to be treated by the doctrine of comity as a true

[55] *Bonanza Case, ubi supra*, p. 578.
[56] *Ibid.*, p. 585.

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juristic person and as if the company had been created by a "plenary sovereign authority."

Foregoing extracts point out that the power exists to attach the incidents of a common law corporation to any company, provided suitable legislation is enacted. Why does not the same power exist to grant an extra-provincial capacity? The two phases of the power seem to be referable to the same principles, historically or otherwise. The Statute may however be—

> "directed in terms which confine the legal personality . . . to existence for the purpose of merely territorial objects and within territorial limits."[57]

As to the Companies Acts of the Dominion and Ontario it is expressly said that—

> "There is nothing in the language used . . . which for instance would preclude such a company from having an office or branch outside Canada."[58]

In the *Weyburn Case* it was held that the company (which had been incorporated under a memorandum of association) had no extra-territorial capacity and that neither the Saskatchewan Act conferring such capacity on all its companies nor the Ontario license to do business had any retroactive effect so as to validate the contract at issue, at any rate to the prejudice of the civil rights of a resident of Ontario.[59] The decision appeals to one as sound, and the *ratio decidendi* is applicable certainly to all companies incorporated in the same way or by special Act. It may be inferred from the *Bonanza* judgment that companies formed under a letters patent system do not need the grant of any further capacity.

What is sauce for the goose being sauce for the gander, how far can the Parliament of Canada confer a capacity effective outside the Dominion, and does a Dominion company established by special Act require

[57] *Ibid.*, p. 578.
[58] *Bonanza Case, ubi supra*, p. 582.
[59] *Weyburn Townsite Case, ubi supra.*

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to be expressly invested with such capacity? It has indeed been held as to such a company that although

"the powers which the Dominion Parliament gave it ceased, it is true, at the Canadian frontier, yet as a legal *persona*, having a legal existence it had the power in virtue of international law to carry on its business in foreign lands, provided it was authorized to do so by the laws of the foreign country."[60]

It is, nevertheless, arguable that a Dominion company of this type is on the same footing as a Provincial company. In the one case the constitutional limitation is the peace, order and good government of Canada and in the other provincial objects—neither Government is in the true sense a "plenary sovereign authority."

Turning now to the question of capacity or no capacity, it is evident that the matter is controlled by the form of the constitution of the company and its effects. To what companies does the *ultra vires* doctrine apply and what is the result when it does not apply? The words of the learned Editor of this magazine set forth above summarized the position of the statutory company. If it does what is not authorized by its memorandum or by statute—

"it is doing what is *ultra vires* and so prohibited as lying outside its existence in contemplation of law."[61]

"Either because the Memorandum of Association . . . or the statute under which incorporation took place did not authorise, and therefore excluded incorporation for such a purpose."[62]

But it was always held in Canada that the same doctrine applied to the "chartered" type of company formed under Canadian Acts. The *Bonanza Case* (which has been applied in *Edwards* v. *Blackmore*[63]) decides that these companies have an unlimited capacity, subject to certain restrictions, and that—

"The doctrine of *Ashbury Carriage Co.* v. *Riche* does not apply where (sc: as in the case of the Dominion and Ontario Companies

[60] *Montreal-Canada Fire Insurance Co.* v. *National Trust Co.*, 35 D. L. R. 445, followed in *Kittles* v. *Colonial Assurance Co.*, *ibid.*, 588.
[61] *Bonanza Case*, *ubi supra*, p. 578.
[62] *Ibid.*, p. 584.
[63] *Edwards* v. *Blackmore*, 42 O. L. R. 105.

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Acts), the company purports to derive its existence from the Act of the Sovereign (or Secretary of State), and not merely from the words of the regulating statute."[84]

"In the case of a company created by charter the doctrine of *ultra vires* has no real application . . . in the absence of statutory restriction, added to what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights."[85]

In other words, the legislature must definitely enact that the unlimited capacity shall be confined to the precise purposes specified in the charter. If it does not choose to do so, then the position is merely this:

"If by the terms of the charter it is prohibited from doing any act, a violation of this prohibition is an act not beyond its capacity, and is therefore not *ultra vires*. . . . In the case of a company the legal existence of which is wholly derived from the words of a statute, the company does not possess the general capacity of a natural person and the doctrine of *ultra vires* applies."[86]

Even a prohibition in the charter does not in Coke's words "bind in law." The principle applies with more force when neither the statute nor the charter prohibits. The only restrictions in the Dominion Companies Act are (by way of example) such provisions as sec. 26 as to commencement of business and sec. 34 as to extension of powers. The result of failure to observe conditions and restrictions is that it—

"may well give ground for proceedings by way of *scire facias* for forfeiture of the charter."[87]

With this compare the language used in the old case of *Rendall* v. *Crystal Palace Co.* (see note 35, *supra*)—

"Nevertheless, the power of the Crown or State to cancel a charter . . . for non-observance of conditions remains in full vigour . . ." and ". . . where a corporation or its officials are acting contrary to the provisions of their charter . . . the Courts will, upon the request of any member, restrain such acts."

and also in the case of the *Eastern Archipelago Co.* (see note 34, *supra*), where a breach of a restriction

[84] *Bonanza Case, ibid.*, p. 582.
[85] *Ibid.*, p. 583.
[86] *Bonanza Case, ibid*, p. 584.
[87] *Bonanza Case, ubi supra*, p. 584.

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similar to that imposed by sec. 26 of the Dominion Companies Act was held to be—

> "an abuse of the charter, which worked a forfeiture and rendered them liable to have it cancelled by means of a *scire facias*," to which "the subject is entitled *ex debito justitiæ*."

Surely the lineage in law of the "surprising" doctrine enunciated in the *Bonanza Case* needs no further proof. It is now for those who are interested to settle whether the policy of allowing untrammelled liberty to companies is to-day the path of true wisdom, and if it does not find favour in their eyes, to call for amendment of the law accordingly.

NOTE.—Lindley on Companies (6th ed., p. 139), refers to the Letters Patent Act—7 W. 4 and 1 V. ch. 73—alluded to on p. 477 *ante*, and which, by the way, although obsolete, stands unrepealed to-day. It is stated there that "companies formed under this Act are not corporations." This remark is entirely misleading, although it is true and obvious. The Act relates to (*inter alios*) companies created by direct charter from the Crown under letters patent. It expressly recites that one of the purposes of the enactment is to extend the powers of the Crown to grant such charters, and, carrying out that intention, provides (for example) that the Crown may make members liable for the debts of the corporation and may restrict its term of existence to a limited number of years—neither provision being permissible at common law. The whole Act deals with Companies *and* Corporations, or, as they are styled in some sections, "Bodies." I add this note because this "statutory" method in many particulars resembles the Canadian "Letters Patent" Acts, but it is governed by entirely different principles from what is commonly known as the "statutory" method, namely, that to which the "*ultra vires doctrine*" applies).

H. G. GARRETT.

Victoria, B.C.

(*To be continued*).

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DR. JEKYLL AND MR. HYDE.

By C. B. Forsyth.

In the Provinces of Canada to-day, there are hundreds of lawyers daily striving to emulate Psychic Miracles, in comparison with which the performances of the hero of Stevenson's wonderful nightmare drama fade into insignificance. Functioning at one moment as Mr. Jekyll, the Solicitor, he must, in the twinkling of an eye, assume the role of Mr. Hyde, the Barrister, or if the simile thus put offends, you are at liberty to reverse it.

In all older countries, one finds the profession of law divided into two separate branches, with a well defined line of demarcation between the practitioners of each. In England, Scotland and Ireland this separation has now existed long enough in its present form for time, the infallible Judge of good and evil, to definitely and finally pronounce in its favour, and it has never been suggested there, either by the Barrister or by the Solicitor, that a double-barrelled legal luminary would be an advantage to either, to the Public or to the State. That the occupations of attorney and advocate should be merged in the early days of a new country may be a necessary expedient, but it is surely a most undesirable makeshift and ought to be abandoned at the earliest possible moment at which the progress of the country permits. Has not Canada already reached that point?

An Attorney meaning simply one who acts for another and an Advocate one who pleads for another, they much more clearly show the essential difference between the equivalents, Solicitor and Barrister, in use in England and Canada. Indeed, it is no compliment to be called a Solicitor in some countries, particularly in the United States of America for instance, where it is applied to a travelling salesman or

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peddler and, it must be admitted, much more appropriately so than to a lawyer; while the word Barrister simply signifies one who is qualified to appear at the Bar and does not, quite truthfully, in the vast majority of cases, connote any gift or qualification as an advocate.

The duties of a Solicitor, understood in a legal sense, are mainly those of an Attorney. The duties of a Barrister are solely those of an Advocate or Pleader. They are as different as black from white, and the necessary qualifications, apart from the common ground of a knowledge of certain aspects of the law only, are as different as chalk from cheese. Any well educated person of good character may by the necessary study become a very capable Solicitor, but an Advocate, like a poet, is born, not made. True, you can easily make a Barrister. The woods are full of them, but an advocate is *rara avis* the world over. They are particularly scarce where the profession is not divided, for the gifted ones find no opportunity for their special ability to develop and their genius is first stultified and finally suffocated and extinguished by the work which they are compelled to do to earn a living, long before they are financially in a position (if they ever are) to take up, by election, that branch of the law which, by nature, they are peculiarly fitted for.

Advocacy is an art the most difficult of all arts, and the gifted pleader may have but the meagerest knowledge of law and succeed where the profoundest legal scholar will fail. Of course, to be a truly great advocate, a sound knowledge of legal principles is necessary, but the point is that no amount of legal education will ever make an advocate, and that the knowledge of law which the advocate requires is quite different in its essential character from that required of the Solicitor. Moreover, this particular aspect of the law, where the profession is not divided, is being largely

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lost sight of and the consequence to the Science of Jurisprudence is a calamity as serious and irreparable as it is unnoticed or disregarded. Only the future will show how great this loss is, but the handwriting is already on the wall in the shape of futile legislation and conflicting and irreconcilable judgments.

How can the jaded Solicitor who is compelled to follow a case from the travail of its birth through the varied, often stormy, vicissitudes of Chamber work, to the Trial, be expected to perform a miracle and resurrect it from the dust and ashes which it probably was to him long before reaching the final stage of the proceedings? Where is the incentive to come from, unless the Counsel fee with brief for trial is more than what it generally is—a mere book entry? Were it but for that freshness and vigor which a new mind brings into the case, the advocate justifies his existence to-day as he has done and is doing in every country in the globe that values pure Justice as the most precious possession of the people.

The mere fact that a Solicitor must attend to or at least supervise daily office routine, alone completely unfits him for the work of an advocate. He must sacrifice this work for days to do justice to a case in Court of any importance, or he must crucify the case. He has no alternative and, even if he can afford to neglect his correspondence, his clients and his Bank Account for a time, a hundred things foreign to the case are eternally clamouring for attention and are always, perforce, back of his mind.

The advocate, on the other hand, has none of those worries and unless he be a Leader he will generally be handling not more than a few cases at the same time, so that his brain is clear and concentration—without which there can be no efficient advocacy—is possible.

Our Judges are often subjected to criticism, and if any fault is to be found with the Bench in Canada, is it not largely because the facts and the Law are mostly presented to them in an amateurish and incomplete

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way for which not the practitioners but this abominable system is largely to blame?

But why labour a point so obvious? The futile attempt to act the part of Dr. Jekyll and Mr. Hyde is simply victimising those members of the profession who by force of circumstances are compelled to function in the dual capacity and is ruining their morale, Moreover, further toleration of this pernicious system will slowly, but not less surely, undermine that invaluable asset of good government, an able Judiciary, and subject it to decadence and ultimate destruction.

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OUR LONDON LETTER.

The Editor, "Canadian Law Times."

Mr. Justice Avory's Committee has recommended that on a criminal charge the defence of coercion by her husband should no longer be open to a woman. The defence is merely a presumption in her favour when the crime is done in her husband's presence, and is rebuttable by showing that the wife took a controlling or quite independent part in the crime. If legislative effect is given to the recommendation there will no longer be the presumption, but the coercion may be urged in mitigation of punishment, and the wife will be free to prove compulsion, within the limits in which compulsion is a defence, whether it be that of her husband or of any other person.

The committee was appointed on April 1st as a result of the Peel case. Captain and Mrs. Peel were charged with obtaining money from bookmakers by means of forged telegrams, and apparently both took an active part in the plan to defraud. Mr. Justice Darling, in withdrawing the case of Mrs. Peel from the jury, pointed out the absurdity of the law in modern conditions. It is a survival not of chivalry but of an age of feminine subservience. English law is slow, however, to remove any rules which favour a prisoner, and in the early nineteenth century judges eagerly applied the doctrine of coercion. Then some 220 offences were punishable with death. Benefit of clergy saved men who could read and write from the overloaded gallows, but that way of escape was not open to women. The doctrine of marital coercion was, therefore, stretched to mitigate their lot. Now, however, one more of the charitable technicalities of the criminal law is to be swept away and a rule in accord with modern conditions substituted.

The Peel case was sensational merely because the prisoners were well known, for betting frauds are

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appallingly common. Gambling is the national vice of England. Every week-day of the year horses are held, and the evening papers start publishing special editions about ten o'clock in the morning. The latest wires from Newmarket or Epsom are eagerly bought by crowds waiting to put money on the races, and many persons, day after day, bet on practically every race. Every office of any size has its bookmaker's tout, and girl typists who never saw a race, perhaps never a race horse, regularly stake their sixpences. In the East End of London children come to "bookies" with money and betting slips from their washerwomen mothers, and the police make almost daily raids in an effort to end the practice. Meantime in the West End more wealthy betting people quite legally run accounts with "turf accountants" in handsome offices; and while the Home Office charges the poor in the police court, the Post Office installs special telegraph instruments to serve the rich in their gambling. In the meantime the evil becomes more and more widespread, and even church choirs have been known to hold sweepstakes on the numbers of the hymns which the organist or minister will choose. It is more than time that the legislature reviewed thoroughly and systematically the whole law of betting.

The long list of Gaming Acts which figure in any book on contracts speaks eloquently of the persistent nature of the evil and of the vanity of past attempts to meet it. The Gaming Acts of 1845 and 1892 are as ineffective as the earlier ones of Henry VIII., Charles II., William III., Anne or William IV. Public attention has, however, been recently concentrated on the subject by determined efforts to wriggle out of the decision in *Dey* v. *Mayo* (1920), 2 K. B. 346; 89 L. J. (K. B.) 241. As your readers know, that decision was based on a hitherto overlooked but unrepealed section of the Gaming Act, 1835, and has the effect of making money for bets which has been paid by cheque recoverable from the winner, unless the debt is statute barred.

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The decision was generally doubted, but more careful investigation confirmed the reasoning on which it was based, and in *Sutters* v. *Briggs* (1922), 1 A. C. 1; 91 L. J. (K. B.) 1, the House of Lords affirmed the principle. Since then there has been chaos in the betting world, and the judges have had to deal with many novel points. In the County Courts (*i.e.*, in England, the inferior courts of civil jurisdiction) it has been held that money paid by cheque as a deposit to cover possible future losses is not recoverable, and that a plaintiff must give particulars before discovery of the date of the cheques, the horses backed, and the amount risked on each horse. This latter decision has proved effective in meeting a type of fraud of which several instances have already appeared. After inducing bookmakers known to them to cash cheques for them, several persons have sought to bring actions for the recovery of the amount of these cheques; but as that type of person does not appear to advantage under cross-examination the attempted frauds have been more ingenious than successful. In the High Court it has been held that money paid for betting losses by a principal to his agent are not recoverable (*Maskell* v. *Hill* (1921), 3 K. B. 157; 90 L. J. (K. B.) 1322); that where only part of a cheque is for betting losses the considerations can be severed and part of the sum can be recovered (*Robinson* v. *Marsh*, [1921] 2 K. B. 640; 90 L. J. (K. B.) 1317), and that only when cash has been paid for a cheque can it be recovered. Thus where the winner of bets kept the cheques given to him and returned them to his client when the luck changed, it was held no action lay. An ingenious attempt was made in *Cohen* v. *Hall* (38 T. L. R. 150), to upset *Sutters* v. *Briggs* entirely. By the Gaming Act, 1892, any promise, expressed or implied, to pay money under an agreement with the Gaming Act 1845 renders null and void shall also be null and void. By the Gaming Act of 1835, on which *Sutters* v. *Briggs* rests, the money paid on a cheque is "taken to be a debt due"

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and, it was argued, debt can only arise from a promise, express or implied, to pay. If so, the promise implied by the 1835 Act it made unenforceable by the combined effect of the later acts. The Court of Appeal, however, has agreed with Mr. Justice Roche that the provision of the 1835 Act is still operative ([1922] W. N. 89).

The position of an executor or trustee in bankruptcy when the testator or bankrupt has paid bets by cheque is a difficult one. Debts of honour should be paid. That the law should encourage their evasion by the debtor is bad enough, but now, when the debtor would never avail himself of the law, his executor or trustee in bankruptcy may be under the duty to reclaim money paid, although he may think that honour and morality forbid the making of such a claim. Mr. Justice Astbury, after prolonged argument and consideration, held that a court of equity would not allow a trustee in bankruptcy to bring an action under the *Sutters* v. *Briggs* rule. His Lordship held that a claim under the rule was neither honest nor honourable and public policy did not require a man to rob his bookmaker whom he had induced to trust him. Therefore, in the absence of special circumstances, a trustee in bankruptcy should not be allowed to make the claim. The Court of Appeal, however, unanimously reversed the decision, saying that a court was not entitled to say that to enforce a legal right was a shabby and dishonourable thing such as an officer of a court would not be allowed to do (*Scranton's Trustee* v. *Pearse* [1922] W. N. 163).

In criminal law many interesting points have arisen, especially in connection with the Armstrong and True murders. As, however, they raise the whole question of the admissibility of evidence of events not charged in the indictment but similar to the ones there charged, and of insanity and crime, consideration of them must be deferred.

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The Judicial Committee of the Privy Council has adopted the convenient and efficient system of "handing down" their judgments, as is done in the Supreme Court of the United States. The printed reasons for the advice tendered to His Majesty will be handed to the parties and the press, but any application by counsel that the judgment be read will have most favourable consideration. The change of procedure will save much judicial time and will undoubtedly make for increased efficiency and expedition in the hearing of appeals.

The Incorporated Society of Authors has drawn attention to the law relating to the publication of alleged improper books. The public prosecution of a publisher often results in his consenting, to avoid trouble and annoyance, to the withdrawal and destruction of the book, while the author who is chiefly concerned has no opportunity to defend his work. As the Society only asks that the law be altered so as to give such an opportunity, its attitude appears thoroughly sound. The legislative machine is so overworked, however, that there is little prospect of any reform. The Society also wishes to make it necessary for the plaintiff in a libel action to prove that the defendant knew or had the means of knowing of the plaintiff's existence, before the plaintiff can recover a verdict. Lawyers generally, however, would have little doubt that the rule in *Hulton* v. *Jones* (1910), A. C. 20, is the more desirable attitude for the law to adopt.

FRANK GAHAN.

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NOTABLE CASES NOTATED.

Ultra Vires and Corporate Companies.

The Court of Appeal of Saskatchewan has reversed the decision of Mr. Justice Bigelow in the case of *Canadian Bank of Commerce* v. *Cudworth Rural Telephone Company, Limited.*[1] The Judgment is unanimous, and so far as this case goes it restores to us the principle or doctrine of *ultra vires* which has been regarded by Text Book Writers and Lawyers generally as wiped out since *Edwards* v. *Blackmore*[2] was decided by the Appellate Division of the Supreme Court of Ontario.

We have been discussing the subject from a standpoint directly opposite to *Edwards* v. *Blackmore* for some months; and though *Cudworth's Case* has been decided on the effect of the special Statutory Enactment under which the Cudworth Rural Telephone Company was formed, yet the Judgment of the Appeal Court is in harmony with the views which we have been propounding.

This Judgment at all events holds that Section 14 of the Canadian Act (R. S. S. 1920, cap. 76) has not the effect of making the Saskatchewan Company a Common Law Corporation, though this ostensibly was its aim; and the corresponding section in the Companies Act of Ontario (R. S. O. 1914, cap. 178) has been held in *Edwards* v. *Blackmore* to have that effect —the effect namely of investing Ontario Companies with the powers of Common Law Corporations.

Cudworth's Case arose under the Rural Telephone Act (R. S. S. cap. 96). This Act requires Companies formed under it to be incorporated and registered under the Companies Act, and Section 46 of the Rural Telephone Act provides that "except in so far as varied by this Act the provisions of the Companies Act

[1] (1922), W. W. R. Vol. 1, p. 287.
[2] (1918), 42 O. L. R. 105.

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shall apply to every Company organized under it''—the Rural Telephone Act.

Section 3 of the Rural Telephone Act specifies practically what the Memorandum of Association specifies in ordinary Companies; and the Company is formed for carrying out the objects so specified and has no powers beyond that. It is the same with the Ordinary Statutory Company. There is nothing in Section 3 to authorize the Company to give Negotiable Instruments; but in spite of this it did give a Promissory Note, and afterwards disputed it, for a liability in respect of its works. The fact that the Note, as subsequently transpired, was given for an excessive amount does not affect this question.

The Note was disputed on the ground that the Company had no specific power to give it and had no implied power not being a trading but merely a mechanical Company—a doer of mechanical work like a printer for instance.

To the aid of the Plaintiff the Bank of Commerce which was a holder of the Note in due course was brought section 14 of the Companies Act which specifically applies to "Every Company heretofore or hereafter created" (a) "under any general or special Act of this Legislature" and provides (*inter alia*) that "so far as the capacities of such Companies are concerned their incorporation shall have the same effect as if the Company were or had been incorporated by Letters Patent under the Great Seal."

The Plaintiff contended that this provision invested the Company with the Status of a Common Law Corporation, and that it had, as a consequence, "the capacity of a natural person" to sign the Promissory Note. Mr. Justice Bigelow upheld this contention on the authority of *Edwards* v. *Blackmore*.

The Court of Appeal reverses this and emphatically holds that section 14 does not apply to a Company organized under the Rural Telephone Act, though section 46 of this last-named Act expressly says that the Companies Act does apply to Rural Telephone Com-

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panies except in so far as its provisions are varied. There is nothing stated in the Judgment of the Appeal Court to show how section 14 is excluded or even varied. But there is an opinion expressed at the end of the Judgment that, even if section 14 did apply, the provisions of the general Act—that is, the Companies Act—must be held to be subject to the special limitations, restrictions, and provisions of the Rural Telephone Act.

This is the real solution and we regret exceedingly it is put merely in this *ultima ratio* form.

With deference, we submit section 14 does apply, so far as it means anything, to Rural Telephone Companies, but the specific provisions of the Rural Telephone Act render it abortive, or at all events so inoperative as to nullify it.

This is precisely what we have been contending for in the series of Articles in the CANADIAN LAW TIMES since March last. Not only have we this consolatory endorsement by the Court of Appeal of our views but, so far as its principle is concerned, the ordinary Company incorporated by the registration of a Memorandum of Association under the Companies Act is in even a stronger position than a Company like the Cudworth Telephone Company formed under a Special Act but incorporated by registration under the Companies Act. For in the case of the ordinary Company all its powers are within the incorporating Act, and the specific must prevail over the general, and more particularly when the specific provisions constitute a Statutory Company limited in scope, objects, powers, and capacities, and the general provisions, pretend, with a sweep, to abrogate all these and to transform this restricted entity into a Common Law Corporation which has neither limit nor bounds to its power except the measure of the capacity or power of an individual man fully *compos mentis*. The day of miracles has passed even for such a transcendent piece of Legislative wonder-working!

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The Court of Appeal, however, concurs with all the orthodox authorities set out in its Judgment that even a Common Law Corporation has not the capacity to sign Negotiable instruments unless it is invested with some specific or implied authority to do so; and that the Cudworth Telephone Company had no such authority even under the vague generalities of section 14 of the Companies Act.

Bankruptcy; Trade Secret a Good-will.

In *Re Keene*[3] is a case of general interest decided by the Court of Appeal in England. The Debtor who carried on business as a Company was the manufacturer or producer of certain commodities with respect to which he had a trade secret known only to himself and a brother who formerly traded with him in Copartnership. The brother had been dissevered from the English business, and was carrying on in France the same class of business on his own account. This was according to agreement. The Registrar had got an offer to buy the English business on the condition that the Purchaser should be given the secret. The Registrar ordered the disclosure to him of the secret. The Bankrupt or Debtor contended it was no part of the property of the business; that not only was the secret something reposed in himself as a mental acquisition, and not as a property; but also that his own brother's personal skill was essential to its operation.

The Bankruptcy Judge upheld the Registrar, and now the Court of Appeal affirms that ruling, holding that the Trade Secret is part of the Good-will which is an asset realizable by the Trustee and distributable among the Creditors.

Suppose he eliminates an essential ingredient, what then?

The disclosure may work all right: but the basis of the judgment does not seem clear. Can any man

[3] 38 T. L. R., p. 633.

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when he is made a Bankrupt be compelled to disclose his mental acquisitions, particularly those by the use of which he has carried out some successful business operations?

Lien; Bailee's Authority to Create as against Bailer.

Pennington v. *Reliance Motor Works*[4] is a case of some interest in the Motor World. The Plaintiff ordered a Saloon-body for his Motor-car from E. who undertook the work for £500, and then sub-bargained with the Defendants that they would do it for £377. The Plaintiff never authorized this or the delivery of the car to any third person or to the Defendants. The Plaintiff paid E, the first Contractor—the only Contractor he knew and to whom he delivered the car for repair purposes—and E, when the work was done, repossessed himself of the car without paying the sub-contractor, the Defendants; and he also delivered the car to the Plaintiff. Subsequently the car was sent to the Defendants by the Plaintiff for repairs and then they claimed a Lien on it for the amount owed them by E as well as a Lien for the cost of the new work done at the instance of the Plaintiff himself.

The contention was that when the work for which E delivered the car, originally, to the Defendants was complete, E got the possession of the car by a trick, amounting to a fraud, and that therefore the Lien was not destroyed. The Court held there was no evidence of any trick and that the Defendants had voluntarily delivered the car to E, or at least had made no claim to retain it as a Lienholder when the Plaintiff went and took possession of it.

Next the Court held there was no valid Lien by E to the Defendants. There was no authority, express or implied, for E to part with the car to anyone; and without such authoritly no Lien could be created.

The cases relied on were *Buxton* v. *Bougham*,[5] and *Cassils* v. *Holden*.[6]

[4] 38 T. L. R. 670.
[5] 6 C. & P. 674.
[6] 112 L. T. 373.

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Against these were *Keene* v. *Thomas*,[7] and *The Singer Co.* v. *London & S. W. Rly.*[8] But these were clearly cases of an exceptional character; because there was an implied authority to pledge in *Keene* v. *Thomas* and the case was decided upon that; and in the *Sugar Co.* v. *London* the nature of the Lien was exceptional—in fact, it was Statutory and did not depend upon assent or authority. It was in fact a Lien for cloak room charges at a Railway Station where the Machine was placed for the purpose of transport, and according to the Railway Station regulations the cloak room charges became a Lien against everybody with or without consent.

Interrogatories or Examination for Discovery.

It does not seem to be recognized that the scope of the Examination for Discovery is no greater than the scope allowed for Interrogatories; that is, the questions must be pertinent to the Plaintiff's case or be destructive of the Defendant's case.

One cannot stray at large over the cross-examination field, and ask questions either by way of Interrogatory or Discovery, the answer to which does not directly help or hurt the case of the parties to the action. This was relaid down by the Court of Appeal in *Re The Shropshire*.[9] The case was one of the loss of a ship by fire. It was in the Dock or Yard of the Defendant for that purpose when it was destroyed or rather damaged, through the want of the exercise of reasonable skill and care.

One of the questions delivered as an Interrogatory was "What do you say was the cause of the fire?"

Sir Henry Duke, who first heard the objection to the interrogatory held that it was an interrogatory of a vague kind intended to elicit information in aid of Plaintiff's case; and Lord Justice Warrington in the Court of Appeal held the interrogatory was framed

[7] 21 T. L. R. 2.
[8] 1894, 1 Q. B. 833.
[9] 28 T. L. R. 667.

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apparently with the object of compelling the Defendant to set up an affirmative case, or to disclose their line of defence to the Plaintiff's case. In either case it was not a proper question.

N.B.—It is sometimes very hard to draw the line in questions where the system of oral examination for discovery prevails. That the system is abused is often very evident. The abuse, however, is not so much attributable to intention as to ignorance of the limitation. The limitation is that one cannot ask on an oral examination for discovery any question which could not be put as an Interrogatory to be answered on Oath by the opposite party.

Railway Liability; Owner's Risk Note.

London & N. W. Railway v. *Neilson*[10] is an interesting question, and one which is common to transit by Railway everywhere. We all know what the Owner's Risk Note is. It is a Contract by which the Owner of the goods agrees with the carrier that in consideration of his conveying the goods at a certain rate he will waive all claims for loss or damage, etcetera "except upon proof that such damage, loss, misdelivery, delay, etcetera, arose from the wilful misconduct of the Company's servants." By the terms of the Note relied on in this case by the Defendant Company, the Shipper Nelson, who was a Theatrical Manager passing from place to place with the stage paraphernalia, was entitled to the exclusive use of a free truck, and by an arrangement between the parties a brake was provided in lieu of the truck. The Van with the train duly arrived at Manchester, but between Chester and Manchester the label attached to the Van at Llandudno had become detached, and the Railway Company's servant, by misreading a telegram and by other blundering, discharged the Van instead of sending it on according to the contract and according to the labels to Bolton.

Owing to its non-arrival, the advertised performance fell through. In fact, some packages containing

[10] 38 T. L. R. 653.

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no labels were put in the Cloak-room at Manchester while others were sent back to places named on old labels attached to them.

It was first held the Plaintiff had failed to prove "wilful misconduct"; second, that the delay did not originate while the goods were being carried by a substituted method of conveyance, but arose at Manchester where the Contract was being performed in the stipulated manner.

The Division Court set aside this and held that the delay did not occur during the time when the Railway Company were performing their Contract so as to bring the case within the protection afforded by the consignment note.

The Court of Appeal upheld this; and so did the House of Lords.

Lord Atkinson, adopting Lord Justice Scrutton's view in the Appeal Court, said in the House of Lords, "Where a special provision such as that relied on in this case is introduced into a Contract . . . it must be held in the absence of language indicating the contrary, to refer to the subject-matter of the Contract and that alone, namely, the carriage of the goods from the point of departure to the destination named by the route expressly or impliedly indicated. The special provision would admittedly have no application to a route wholly different, from start to finish, to the stipulated route.

The Court distinctly over-rode the case of *Forster* v. *G. W. Railway,*[11] as based on an erroneous principle.

Conditions Subsequent.

Capital Counties Bank v. *Boulter*[12] is an interesting case on the ever-recurring question of Conditions subsequent to gifts which constantly defeat themselves by invading one principle or other controlling them.

In this case Mr. Boulter made his Will whereby he directed that one-sixth equal part of his residuary

[11] (1904), 2 K. B. 306.
[12] 1922. L. T. R. Vol. 126, p. 653.

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estate should be appropriated for the benefit of his son S. J. Boulter and should be held by his Trustees upon Trust to pay the income to his son during his life and from and after his decease upon Trust for the children of his said son as he should by deed or Will appoint and in default equally between them.

This was all clear. But to this was appended a Provision declaring that the gifts in favour of the children were upon the "express condition" that they should during their minority be maintained in England "and do not reside abroad except for periods exceeding six weeks in each year"; and that on non-compliance with the condition the shares of the children should be forfeited, and were disposed of under a Gift-over in that event to another party.

The father of the children was, for certain purposes, not connected with the gift or estate, obliged to go to Europe to reside and the question came before the Court for an interpretation as to what the consequences might be to the children entitled to this bequest or gift, if, as was the natural and proper thing, he brought them along with him and his wife, their Mother.

It was contended the condition was bad on three grounds. It was certainly a subsequent condition, that is, a condition arising subsequent to the vesting of a real interest, and a condition defeating the interest after it had been vested.

In this case the condition was claimed to be void because it was (a) too uncertain, (b) contrary to public policy, and (c) impossible of compliance.

Was Scotland or Ireland or the Channel Islands—all just next door to England, places "abroad" within the meaning of the condition?

Sargant, J., delivered an excellent and lucid judgment based largely on the doctrine that the condition was void as being against public policy. The father had to go out of England—or abroad—on business. The

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natural place for the children was with the father, and it is certainly *contra bonos mores* to deprive them of a gift merely because of their obeying, in circumstances over which they had no control, the natural instinct. They had and could have at their age no volition in the matter of choice as to following their father or losing their legacy.

These cases were cited: *Clavering* v. *Ellison*,[13] *Woodman* v. *Berwick*,[14] *Partridge* v. *Partridge*.[15]

Shipping Contract—Terms of Charter-party against Custom of Wharf.

Palgrave v. *Turdid Owners*[16] is a case of a conflict between the wording of a Charter-party and the custom of the Port of Shipment or Discharge of a cargo. The Charter-party provided that a steamer should deliver a cargo of timber at Yarmouth or as near thereto as she might safely get "always afloat." Clause 3 also provided that the cargo should be discharged as fast as the steamer could deliver "according to the custom of the Port . . . the cargo to be brought to and taken from alongside the steamer at Charterers' risk as customary."

On account of her draught the steamer could not come nearer the quay than 13 feet. The custom of the Port in such cases was that a staging should be erected between the Ship and the Quay, over which the cargo was carried and deposited not less than 10 feet from the Quay, the expense of the staging and discharge in this manner being borne by the shippers.

It was held that the Custom of the Port was inconsistent with the Express terms of the Charter-party and that the expense should be borne by the Charterers.

This was an affirmance of the Court of Appeal decision, 90 L. J. P. 226; (1921) p. 146. The principles laid down in *Holman* v. *Wade*.

[13] 7 H. L. Cas. 797.
[14] (1916), 2 Ch. 304.
[15] (1894), 1 Ch. 351.
[16] L. J. R. Vol. 91, Q. B. D., p. 81.

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It is noteworthy that the amount involved in this case was only £46 odd, so it is manifest the parties were contending for a principle.

The case was first tried in the County Court. Thence it went to a Divisional Court which disagreed. Then it went to the Court of Appeal, and finally to the House of Lords. Both of the latter Courts agreed that the Custom of the Port could not prevail over the specific Contract.

To the practitioner engaged in advising on Shipping business this is a very valuable decision and it should be read. The main views expressed both in the Court of Appeal and in the House of Lords are set out in this report. The Lord Chancellor exhaustively examined the authorities; but it is remarkable that the one most quoted and most relied on was *Holman* v. *Wade,* which has never been regularly reported and is only to be found in The Times, May 11, 1877.

Contempt of Court.

Dunn v. *Bevan and Brodie* v. *Bevan*[17] is an interesting case on the Law of Contempt of Court. The facts are that certain members of a Trade Union brought an action against the Officials of the Union. After the action was heard and judgment given the Plaintiffs issued and distributed among the members of the Union a circular containing what the Defendants alleged to be unfair statements regarding the proceedings at the trial. A motion was brought for an Injunction to restrain the Plaintiffs from so injuring the Defendants. It was refused; and it was laid down that where legal proceedings in a Court have terminated and come entirely to an end, statements made by either party to such proceedings as to what occurred at the trial and comments thereon cannot be regarded as Contempt of Court with the resultant consequences. In such a case the Court will not grant an Injunction unless the statements amount to a scandalizing of the

[17] 91 L. J. Ch., p. 299.

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Court by making personal attacks on the Judge who presided at the trial or might be considered as interfering with the administration of Justice. If the case is entirely ended the Court will not interfere in the matter. That is the general principle laid down. It was said the law of contempt ought not to be enlarged nor applied to matters outside the well-known principles.

Mr. Justice Sargant who tried the original case and heard the Motion delivered an excellent judgment on the Motion. It should be read. He referred only to a few cases like *Metzier* v. *Gounod*[18] *and Dallas* v. *Ledger*,[19] and made it clear that contempt means comment pending proceedings. When they are ended, contempt ends, unless grave scandalizing of the Judge takes place.

B. T.

[18] (1874), 30 L. T. 264.
[19] (1888), 4 T. L. R. 432.

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BOOK REVIEWS.

The Canadian Law of Landlord and Tenant, by Esten K. Williams, of Osgoode Hall, Barrister-at-Law and of the Bar of Manitoba. Toronto: The Carswell Company, Limited.

The Author of this timely work on a subject which is always, with varying conditions, presenting new problems for solution, is well known to the Legal Profession of Canada as the Author of the Manitoba King's Bench Act Annotated; as the erstwhile Editor of the Western Law Reporter; as the Editor of the Digest of Canadian Case Law; and as one of the Lecturers to the Manitoba Law School. Presumptively, therefore, he is well equipped for the work of presenting the phases of the Law of Landlord and Tenant; and on a perusal of this volume one can truly say the presumption has been turned into a realization.

The Author says the work does not purport to be a treatise, nor yet is it a codification, but merely an attempt to state the general principles of the law with the authority from which they are derived or on which they are based.

It is a disclaimer very much in the nature of Coriolanus; for what is disclaimed is vividly found by looking a little closer than the all-too-modest words.

We have found the work a perfect repertoire of all the great principles and the Statutory Enactments governing the relationship of Landlord and Tenant, not only in England, but in the various Provinces of Canada.

Most conveniently the work is divided into 16 chapters, which, besides an admirable index, render the Book easy of reference to anyone consulting it.

If it were possible to cavil in this day of absolute abandonment to Case Law, we might say there is a superabundance of cases in this Book. The references to them cover some 90 pages; but on examining these, at various points, we find them so absolutely pertinent

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and so piquantly reflected in the text, that they are indispensable. And then they have this added advantage for the practitioner, that when he gets a principle stated in this Book, he is not driven to seek for its authority in some other work. This Book avoids speculations, and states principles as established and decided by Law and by confirmative decisions.

It is a work for which there has been a great need in this Country for many years; and to the practitioner in the more or less isolated Towns and Centres it will be even more welcome and valuable than to the busy Lawyer in the Cities, though he, too, will quickly find how it is burnished with solvents for the multitude of complexities which constantly arise demanding instant decision and action.

We must congratulate the Author upon the excellence of his performance; and in doing so we must not overlook Mr. J. M. DeC. O'Grady and Mr. R. M. Fisher, the former of whom has supplied the Index and the latter the Table of Cases, both of which will evoke from the consultant of the Book many an ejaculation of grateful thanks. The Index has often spoiled a really good work; but in this case it is facilitative in the highest degree, and full of cross references.

B. T.

The Fiscal and Diplomatic Freedom of British Dominions, by Edward Parritt. Edited by David Kinley. London: The Clarendon Press. Toronto: The Carswell Company, Limited.

This is one of the Publications of the Carnegie Endowment, and it relates more to economics than to Law. It is the economics, however, of the State or National entity with which the author concerns himself; and as the status and constitutional position of the Dominions of the Empire are intimately entwined with the subject of their freedom in Fiscal affairs, the Book is within our orbit. The Book though it contains much historical data is too laboured and meticulous in giving details of the early clamours of the old

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and sparsely settled Colonies for their absolute Fiscal Freedom. These have no more effect upon the Dominions of to-day than have the clamours of the boy for recognition as a man, anything to do with the Status itself when he attains it. These household displays of parental restraint on one side and childish aggressiveness on the other, pass to oblivion when true maturity eventually comes to the young aspirant; and to recount them after adolescence only provokes derision from both the head and scion of the household; and any attempt at making them a cause of estrangement is sure to meet with their mutual resentment.

The Book is written and edited by Americans; and while the Editor's preface disarms us of any apprehension of bias we find the Book itself, while choked with detailed data and facts of the class named, is the work of a man manifestly with a partisanic attitude of mind. There is a complete ignoring of the viewpoint which Great Britain must have had when her Colonies, being still only in swaddling clothes, were aspiring to the independency of Nationhood but were utterly without protection except what she provided; and restraints from such a parental hand should be judged by the general attitude and not by the immediate tension between the Mother Nation and her Child Colony.

The stages or steps by which the Dominions attained the right to negotiate their Commercial Treaties is of no practical interest to-day except to a strife generator; and the use they have actually made of their power would be of infinitely more value than the reiterated scratching of old sores since 1849. But there is an object in all this which, though adroitly submerged, is seen here and there; for instance, at page 237, where the Monroe doctrine is suddenly shot into line with the principle of responsible Government and both are applauded as "for the good order and peace of the World and for beneficent political civilization." What has the Monroe doctrine got to do with

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the Fiscal Freedom of the Empire's Dominions; and particularly as the Monroe doctrine is as dead as the old nag on which Monroe formerly rode from hustings to hustings?

The Chapters of the book are a continuous rehash of the same material and look to us like the collection of Articles written in Daily News Papers in the States at different periods of Canada's negotiations with Great Britain; all of course with different headings, but all padded with the same incidents and names; all reiterating the same insinuative discord; all without coherence, and all completely oblivious of the fact that Great Britain had protected and safeguarded her Dominions, and encouraged them in their own National development and saved them at the most critical of their crises from falling into the yawning jaws of the vultures always standing ready to devour them.

B. T.

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The Canadian Law Times.

VOL. XLII. TORONTO, AUGUST, 1922. No. 8

EDITORIAL.

Canada's Status.

Whether Canada is a Nation or not is a question which a certain element of the Canadian Daily Press seems determined to settle by the *force majeure* of persistent reiteration of the affirmative.

Quo animo—what is the intention of such an assertion? If Canada is indeed a Sovereign Nation there need be no clamour from the exponents of rabbleism but merely a National assertion of the fact by the Constituent Assembly of the People in Parliament. If she has not yet attained the status of a Nation all the baseless assertion and reiteration of a semi-republican Press cannot create that status for her. The fact that Great Britain would not resist the claim if formally and constitutionally made, and that Canada itself does not make the claim, proves that Canada is content and that the voices which we hear are the voices of agitators only. But again we say *quo animo*—why do these people persist in the inane and insane fatuity of asserting that which is contrary to fact and to law; contrary to Canada's real welfare and interest; and contrary, too, to what Canada herself desires?

As a man's worst enemies are not infrequently those of his own house, so the worst enemies of Canada are those who stand frothing at the mouth, ranting their loyalty, and urging her, prematurely, into the responsibilities of independent sovereign nationhood.

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They never reckon that there is nothing which Canada wants that she has not, or that if she were accorded this status it would retard, if not paralyze by its onerousness, her internal development for many a year.

Without frothing at all, I yield place to no one in my devotion to, and faith in, Canada as a great World-Nation in the not distant future. The time is not yet; and it is fanaticism which tries to accelerate the event regardless of the stages of natural evolution or development, just as it was fanaticism for Mohamet to command the Mountain to come and bow to him, and just as it would be fanaticism for a man to sit in his sanctum in midwinter proclaiming that the summer had come, and believing that wild vociferations to that effect would convince others of the actuality of the phenomenon.

We are yet a considerable distance away from Canada's Status as a Sovereign Nation; and well it is for the Canadian People that it is so.

All the self-governing parts of the Empire were treated with remarkable generosity and recognition in the movements of the Nations who participated in the Great War for securing Peace after hostilities had terminated. The Dominions were made Members of the League of Nations and became Signatories of the Peace Treaty; and they have had representatives at the subsequent Conferences for carrying them into effect. But for all that, there is only one effective party either to the League or to the Treaty so far as the Empire is concerned, and that is the King in whom the Sovereignty of the whole is reposed.

Why should Canada dispute the Sovereignty of the King as head of the whole Empire and insist on her right to a separate recognition? Had England, Scotland or Ireland a separate representation in the League or in the Peace Treaty or in the Conferences since? And they are, and ever have been, Nations without a doubt, though Ireland for the time is only being accorded the status of a Dominion under the new

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Constitutional changes. But the rift in her lute is her own, and is due to two incompatible parties. To save the cake it was sliced; and it has to be rebaked.

The truth is, the agitators who are carrying on a campaign for Canada's Separate Sovereign existence are treasonmongers and enemies of the people of this Country under whatever gloss or stale expletives (transplanted from the chaotic and revolutionary past) they try to present their visionary and fanatical views.

It was recently stated in a Western Daily Paper devoted to this quixotic propaganda that

> **"Canada now proposes to control not only her domestic affairs but also her international affairs; and this implies that she should negotiate all international matters affecting herself . . . Canada could negotiate a Treaty with any Country and endorsement would not be refused."**

Canada for a long time has negotiated her Commercial Treaties under the sanction of the Sovereign or Imperial Government; and what more does she want?—unless, in the construction and maintenance of an Army and Navy commensurate with her territorial area and her maritime boundary on three sides at least, and in the maintenance of a representative of her Sovereignty with a semi-regal retinue at the Court of every other Nation in the World, she wants to squander the money and revenue raised from and by the efforts of her people which should be employed and expended in exploiting and developing the transcendent Natural Resources which are her heritage under the beneficent administrative system of our integral Empire. In stating this I hear the voice of Canada emphatically denouncing the mad propagandist of Separate Nationhood.

Why does Canada want to impose her personality upon her Neighbour next door apart from, and as a distinct entity from, the Sovereign Empire of which she is an integral part? What would she gain if the United States did recognize her and made an international Treaty with her relating to say the Pacific

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Seaboard, distinct from, or it might be at variance with, the United Kingdom or the rest of the Empire? What sanction would such a Treaty have with Canada alone behind it? And how would Canada enforce it? By the clamour of rabblemongers! Bah! Canada beware! Your flatterers are your foes and not your friends.

Men intent upon fanatical achievements are not swayed by reason or by consideration of what the result might be. Nor are they constrained to straight lines or straight issues, by the truth, even as it is known to themselves, and to everyone else.

The rank Republican Journalism of Canada keeps on repeating *ad nauseam* that by virtue of what Lloyd George or Robert Borden or somebody else said in the swirl of the War or of its aftermath, Canada is a Nation. Could these men by a word compel the Sun to stand still? But if Canada is a nation, why do these same agitators keep clamouring for the amendment of the B. N. A. Act, so that Parliament may have control over the constitution of Canada and over its own power? The last demand proves that they do not believe in the first; for if the first were true, the B. N. A. Act would not now be a restraint upon the absolute Sovereignty of the Dominion. The Parliament of Canada would, indeed, be Sovereign; and the Legislatures would have passed from their semi-Sovereignty as it is under the B. N. A. Act, and have become what these self-interested agitators aim at—subsidiary or subordinate legislative authorities. That would be the worst disaster for Canada that it is possible to conceive.

No mere declaration of any Statesman or Leader could possibly change the status of the Dominion into a Sovereign Nation, nor should any mere concession of fraternity arising from Canada's heroic part in the War be elaborated into an abrogation of the *patria potestas* so long maintained with generous beneficence by the United Kingdom and the Imperial Parliament.

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When the time arrives for Canada's assumption of the State and Status of Nationhood, it is not the Dominion or the Parliament of Canada but the Provinces and their Legislatures that must mould the new Constitution.

Except Prince Edward Island, every Province in Canada is, in dimension and resources, a National entity. The Sovereignty of the Provincial Entity rather than that of the United Body, called the Dominion, is the design of the B. N. A. Act. It was in the interest of the Provincial Entities under the Constitution and not of Great Britain or the Imperial Parliament that the restraints, restrictions, and limitations were placed upon the United Body and its Parliament at Ottawa. The Fathers of Confederation—men whose name and memory every Canadian should revere—drew up the Constitution for federating first of all the Old Colonies in the East, and eventually all British North America. It is largely now accomplished.

To achieve the Federal Union the Colonies who entered it stripped themselves of much of their pristine power. This they yielded to a united Body of themselves called the Dominion. But they took good care that they put it beyond the power of the United Body or its Legislature—the Parliament of Canada—to deplete the authority of the Constituent Provinces or their Legislatures. Hence the restraints and limitations about which we hear so much clamour to-day. Neither the Imperial Government nor Parliament had anything to do with them. Canadians made them for themselves, and the Imperial Parliament, on request, enacted them. The whole is a masterful piece of prescient statesmanship; and Canada has grown to greatness through and by it, notwithstanding many sets-back when the Dominion, forgetting its origin and its limitations, assumed the air of an Autocrat. Nowhere was this more vividly seen than in the West. Ever since 1870 the Dominion has claimed to be either

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a Sovereign or Suzerain of the West, quite independent of the B. N. A. Act.

For a long time the Parliament of Canada claimed to be supreme and that the Provincial Legislatures were subordinate to it. What a flagitious perversion! The great Jurist, Lord Watson, knocked that over in the Privy Council, and many other attempted invasions of, or aggressions upon, Provincial Rights. I do not pursue the gruesome story here.

Canadians have had to keep one another within their own Constitution rather than to keep either the United Kingdom or the Imperial Parliament from interfering with it. Neither ever interfered since 1867. That is the great fact we have to remember when we proceed to construct a Constitution for "Canada a Nation." We have to keep our eyes on one another, and forget about the Old Country!!

The Entities or Provinces with their Legislatures must be preserved in their Sovereignty, and the United Body and its Parliament, by whatever name it is called, must derive their authority and power from the Entities. Neither one nor other, *proprio vigore,* can simply declare either its status or rights. To merely declare that Canada, moulded and grooved as it is by the B. N. A. Act, is a Sovereign Nation, as these irascible ranters have said has been done by Lloyd George or Robert Borden, would mean the unharnessing of the B. N. A. Act and the emergence of the Statute-bound Parliament as an absolute Parliament. If that were to happen, its first work indubitably would be the validation of all its wrongs and usurpations in the past, including the usurpation of the lands of the Western Provinces, and next the curtailment of the powers of the Provincial Legislatures. Nothing could resist this short of Civil War, and nothing can avert this except a prescient act, like that of the Fathers of Confederation. That prescient act would be, before Canada's passing to the Status of Sovereign Nationhood, that the People or Legislatures

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of the Provinces should draw up a measure somewhat in design like to the B. N. A. Act, and declaring:

(*a*) The Powers of Parliament and the inter-relation of the new Nation to its constituent Members or Provinces.

(*b*) That the Powers so defined are derived from and cannot be altered without the consent of the Provinces expressed in resolutions passed by or in their Legislatures.

(*c*) The rights of the Provinces and the powers of the Provincial Legislatures; and that they are beyond impairment by the Parliament of Canada except with the consent of the Provinces expressed in resolutions passed by their Legislatures.

The enactment of this Measure first by the Imperial Parliament as the Concedor of the National Status, and secondly by the new National Parliament would *ipso facto* establish the new "Sovereign Nation of Canada." It was the first vision that presented itself to me on my landing in Canada some years ago; and I may live long enough yet to see it realized. I do not want, however, to see it realized precipitately or prematurely, or through the recurrence in Canada of the Revolutionary fever of France in the Eighteenth Century or of Ireland in the Twentieth Century, with all the accompanying havoc of life and property. I do want to see it realized by steady steps from altitude to altitude till the great climax is reached, and reached as nearly as possible concurrently with the other Dominions of the Empire, so that eventually we may see that Empire towering aloft the noblest Governmental pile of the World,—a Federation of Nations in verity and truth, held together by bonds which nothing from without can break, and which can only be impaired by treachery or perfidy from within.

B. T.

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The Wheat Board Act.

No measure has ever been projected in Canada which has made such a long draft on the ingenuity and Constitutional knowledge of the men who prepare our Legislation as has the Wheat Board Act.

Before essaying to frame the measure, the Law Officers of the Dominion Government gave their opinion as to what Parliament could constitutionally do; and then Parliament passed a Bill establishing a Wheat Board as a Corporate Body with power to handle grain. The Act is entirely voluntary so far as the Farmers are concerned; and the Board, as created or established by it, is simply a competitive Agency with other Agencies already existing, except with respect to Section 20 which pretends to invest the Board with powers "to prohibit or impose such conditions or restrictions as may be deemed advisable upon the Export of Wheat from the Province except by or under the authority of the Board."

These powers, it is to be noted, are the only compulsory powers mentioned in the Act, and they are not enacted by Parliament directly, but are delegated to the Board, which may invest itself with them, if it choose to do so, by making regulations approved (a) by the Lieutenant-Governor-in-Council of any Province enacting auxiliary Legislation under Section 19, and (b) by the Governor-General-in-Council.

Well this is surely strange!

Unless Parliament could enact this prohibitive and restrictive Law, it certainly could not delegate to a Board the power to make such a Law by Regulations; and one does not require to be a prodigy like Macaulay's Schoolboy, to know that such a Law is entirely beyond the authority of Parliament. While it destroys or impairs Civil Rights which under Section 92 of the B. N. A. Act are under the control of the Province, it is not a Law for regulating Trade and Commerce so as to place it within the competence of Parliament under Section 91 of the B. N. A. Act.

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It is beyond doubt that Parliament can not improve or add to its Legislative Power by a circumvention such as Section 20 of the Wheat Board Act assuredly is.

The coming into operation of this Dominion Act was made dependent upon auxiliary Legislation by at least two Provinces. Saskatchewan and Alberta responded. But the Legislation passed by these Provinces, almost simultaneously, is also voluntary so far as concerns Farmers and everybody else right down to Section 4; and Section 4 halts at enacting compulsory provisions, but circumventionally enacts *inter alia* that the Board shall have power:

(*b*) to control by license or otherwise the buying and selling of wheat, and to issue licenses in such form as it may decide;

(*d*) to provide . . . that no person, firm or corporation other than the Board shall buy wheat, operate any elevator or warehouse . . . unless licensed by the Board;

(*e*) to require that any wheat sold or purchased shall be delivered to the Board in accordance with such regulations as the Board may from time to time make;

(*h*) to order any person holding wheat stored in any Elevator . . . to sell the same to the Board, or to any purchaser named by the Board, on such terms as the Board may direct.

Then Section 5 pretends to invest the Lieutenant-Governor-in-Council with authority:

to confer on the Board such additional powers as may be deemed advisable to enable it to carry out the purposes for which it has been established.

And Section 6 says:

The Board with the approval of the Lieutenant-Governor in Council may make such regulations as it deems necessary . . . and may create offences and provide penalties in respect of violations of the provisions of the Act or of any order or regulation made by the Board under its authority.

The net effect of all this is, that both Parliament and the Legislatures, while shrinking from enacting compulsory Law, have attempted to achieve the impossible by transforming the Wheat Board Corporation established by the Dominion Act into an Oligarchy with autocratic powers—powers to do at its own sweet will, or bitter caprice, or puerile whim,

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what these Legislative Authorities felt and knew they could not directly enact themselves.

That the Provinces could regulate the buying and selling of Grain by requiring the operators in that sphere of Civil Right to have a Provincial License, I admit; and that they could have delegated to the Board the control over these Licenses with authority to create offences for violation of the regulations under which the Licenses issued, I also admit, provided that the basic general Law or even the basic objective or purpose of the Statute had been enacted by the Provincial Legislatures themselves. But I deny that Parliament had power to enact Section 20 of the Wheat Board Act conferring on the Board the power by regulations approved as therein stated "to prohibit or impose such conditions or restrictions as may be deemed advisable upon the export of Wheat from the Province except under the authority of the Board." Parliament, if it had any power in the matter at all, should have first enacted the prohibition and then left the method of working it out to the regulations of the Board. But Parliament had not power to enact such a prohibition. If there was any power to enact the prohibition at all it was in the Provincial Legislatures, and the Provincial Legislatures have not enacted it. They have not said a word about exportation from the Provinces. They have enacted flummery about licenses in the way of powers for the Wheat Board, and clauses (*e*) and (*h*) of Section 4, the first of which enables the Board to require Wheat sold or bought in the Province to be delivered to the Board, and the second authorizes the Board "to order any person holding wheat stored in any elevator to sell and dispose of the same to the Board." This does not help the Dominion Wheat Board Act, whose only compulsory provision stands alone and it is *ultra vires*. The Board is utterly without authority to prohibit exportation under Section 20 of the Wheat Board Act.

Of course the Lieutenant-Governor may avail himself of Section 5 to confer on the Board additional powers; but I do not expect him to try to bring into

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operation, by the general power of that Section, anything of a compulsory character which the Legislature itself shrank from enacting. The Lieutenant-Governor represents the Sovereignty of the Province; and he cannot be the tool of the Legislature.

The Legislators in both Parliament and the Legislatures seem to forget that there are some matters of Civil Right which they cannot either separately or jointly impair or destroy. They are fundamental in this Country as well as in Great Britain, and Parliamentary power in both countries is dependent upon, and subject to, them and their maintenance.

The Magna Charta and the Bill of Rights confer upon the individual man rights which, without his consent expressly given, Parliament cannot take away even in England.

British people did not overturn autocracy and tyranny in their Kings merely to establish the same species of infamy in their own Legislatures; and the compacts made with their Kings and embodied in Charters, the Bill of Rights and other Acts cannot be abrogated or ignored to ease the clamour of any section of the people.

"Justice shall not be denied to any man," says one of the provisions of Magna Charta; and how does this consort with Section 10 of the Additional Powers Act of Saskatchewan?

No action shall be brought or taken against the Board . . . in respect of anything done or omitted or proposed to be done or omitted in compliance, or assumed compliance, with the provisions of this Act or of any Order-in-Council or order or regulation of the Board made or purporting to be made under its authority without the leave of the Attorney-General.

This Section places a fosse and ditch around the arbitrary and autocratic enactments of both the Dominion and the Province. It is a denial of right and of justice. If an action were brought, the Court might refuse to entertain it till the consent of the Attorney-General had been given. But the consent could not be enforced by a Mandamus, as any action contemplated would be against a Corporate Body merely

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and not against the Crown; and the Attorney-General would find his autocratic power swept aside as a thing regugnant to the fundamentals of our Constitution.

Denial of justice by autocrat Kings or by autocrat Legislatures,—which is the more odious, reprehensible, and unconstitutional?

So far as compulsions and restraints, except those relating to Licenses, are concerned the Board is impotent; and the power of delegating Legislative Authority either to the Lieutenant-Governor or to a Corporation or to anybody else stops far short of what is attempted in this Legislation. Except as to the Licenses, it depends on the voluntary act of everyone concerned, whether he complies with these enactments or not. He cannot be compelled by anything either in the Dominion or the Provincial Acts.

B. T.

Exemptions from Taxation.

The Article by the Editor on the Legality of the Dominion Enactment exempting the system and Lands of the Canadian Pacific Railway from Taxation by the Provinces of Alberta, Saskatchewan, and Manitoba, has been unavoidably held over owing to restricted space in the Holiday Issues. We regret this. But the Article is ready and will appear in September—time enough, we think, for those most concerned in the question which it discusses; and time enough, too, for those who have so long ignored and neglected the Provinces' rights.

It should have been discussed 20 years ago. But better late than never; for the Provinces are young and the Railway has a long time yet to run unless the aeroplane, propelled by the compression of air, should supersede it, thus rendering antiquated the motive power of both Steam and Oil. 'Tis a consummation devoutly to be wished, even though the Provinces should find their taxes on abandoned Railway Stations, dead and rotten tracks, etc., unproductive.

B. T.

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JOINT STOCK LIABILITY COMPANIES

By Bram Thompson, M.A., Regina.

Article No. 4.

Statutory v. Prerogative Powers.

A remarkable confirmation of the argument presented in the March, April and May Issues of the Canadian Law Times relating to Joint Stock Companies and their powers in Canada, especially companies formed under the Statute, but incorporated by Letters Patent, has come to my knowledge in the shape of a decision of the House of Lords. I hasten to communicate this to the vast array of readers who have written me on the subject, some of whom, asking for my authority for "the extraordinary doctrines propounded," had to be satisfied with the statement that the argument, so far, was the result of original thinking and of the application of recondite principles to the confusions and complexities produced by Statutory enactments, Judicial decisions, and dicta of Text Book Writers. I am in the happy position now, however, of yielding to my readers the gratification which I myself experienced when I found the other day that the Law Lords have, to a large extent, at all events, settled the problem involved in my discussion—Whether the Prerogative or the Statute prevails, in the case of an incorporation of a Joint Stock Company by Letters Patent issued pursuant to the Statute.

The decision referred to was rendered in the case of *Attorney-General* v. *De Keysers Hotel,* 1920, A. C. 508. Briefly stated, that case arose out of the compulsory acquisition by the Crown for War purposes of the De Keysers Hotel in London, England. Formerly such an acquisition was effected by virtue of the Sovereign's autocratic Prerogative; and while the party injured by the act had no redress for damages at Law, he could present a Petition of Right for com-

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pensation according to the grace and consideration of the Sovereign. But beginning in 1804 and continuing at periods up till 1914 there was a chain of War Measures Acts for carrying out the commandeering or compulsory acquisition by the Crown of property required for Military purposes or other operations of War. These Statutes prescribed certain procedure for acquisition as well as measures and methods for ascertaining the compensation payable by the Crown. There had been some difficulty in the De Keysers Hotel acquisition under the Statutory Authority; and the Crown, in defending a proceeding brought by the Owner for compensation under the War Measures Acts, raised the question that the acquisition was under the Prerogative Authority and not under the Statute Law.

The Crown claimed that it could mandatorily acquire the property either way; that where the prerogative was pleaded it prevailed and the Statutory provisions were inoperative; and that the Court could entertain no action under the Statute against the Crown.

In a unanimous Judgment the House of Lords maintained that the Statute prevailed, and that the Prerogative was submerged; or at all events if the Prerogative was invoked at all for the acquisition of the De Keysers Hotel, it was controlled by, and subject to, all the conditions and restrictions of the Statute.

Here is what the Law Lords decided:—

Lord Atkinson at page 539:

I agree that there is not a trace of suggestion that the Crown was left free to ignore the Statutory provision and by its unfettered prerogative do the very things the Statute empowered the Crown to do, but free from the conditions and restrictions imposed by the Statute. It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to the exercise by, the Crown of the powers conferred by the Statute if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very things the Statute empowered it to do. One cannot in the construction of a Statute contribute to the Legislature (in the absence of compelling words) an intention so absurd.

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It was suggested that when a Statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative the prerogatives merged in the Statute. I confess I do not think the word "merged" is happily chosen. I should prefer to say that when such a Statute, expressing the will and intention of the King and of the Three Estates of the Realm, is passed it *abridges* the Royal Prerogative while it is in force to this extent: that the Crown can only do the particular thing under, and in accordance with, the Statutory provisions and that its prerogative power to do that thing is in abeyance. Whichever mode of expression be used the result is the same namely that after the Statute has ben passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by, and under, the Statute and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been.

Lord Moulton at page 549:

When the Crown elects to act under a Statute it, like any other person, must take the powers that it thus uses *cum onore*. It cannot take the powers without fulfilling the conditions that the Statute imposes on the use of such powers.

Lord Sumner at page 561:

The Legislature can by enactment deal with a subject-matter in such a way as to abate such portions of the prerogative as apply to it. There is no object in dealing by Statute with the same subject-matter as is already dealt with by the prerogative unless it be either to limit, or at least to vary, its exercise or to provide an additional mode of attaining the same object.

These are precisely the enunciations, in authoritative form, of principles which I contended for in the interpretation of such of our Companies Acts as carry out the final act of incorporation by Letters Patent issued by or on behalf of the Crown under the Prerogative Right. The Dominion, and the Provinces of Ontario, Quebec, Manitoba, and New Brunswick form their Companies in this way; and the Provinces which form them otherwise have made additions to their Companies Acts designed to place them on a parity with Companies formed by Letters Patent.

The principles stated by the House of Lords would, in cases of incorporation of Joint Stock Limited-liability Companies, be much more masterful than they actually were in the case before the Court.

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The Crown could have done the autocratic act of commandeering the property of the De Keysers Hotel either way—either under the Prerogative or under the Statute. But it could not, without the aid of a Statutory enactment, incorporate a Joint Stock Limited-liability Company, as it is to-day in Canada, founded upon the basic principle of a partnership relation between the Shareholders, the entity or corporate Body being in its limitations and restrictions in the relationship of a Trustee of the Shareholders and of their property. All the more emphatically, therefore, when a Company is constructed under Statutory enactment with teguments and restraints which the Crown could not impose, and it is, as thus moulded, presented to the Crown to be vitalized or incorporated into an entity by Letters Patent Charter —the attributes which the Prerogative might import, if it were used autocratically, are *"abridged"* so as to make the entity conform exactly in its powers, with the Statutory requirements. All that it might have beyond that, through the Letters Patent, would be something not expressly prohibited and quite compatible with the conditions and limitations of the Statute—the capacity, for instance, of a Provincial Corporation to acquire the right of operating outside the Province.

There is another great principle laid down in this De Keysers Hotel case. It is this: When a Statute deals with something which previously might have been dealt with by the Prerogative—incorporating a Body politic or aggregate for instance—it is not necessary to specifically mention the King or the Prerogative in order to impair, curb, or control it.

The Prerogative is "the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown"; and ever since the Revolution in the 17th century Parliament, consisting of the King himself, the Lords and the Commons, has been constantly, or at all events when necessity arose, amputating the Prerogative and

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transferring the parts cut off under Parliamentary control. The King is not merely a party to this transfer; he is the enactor of the Statute under which it is effected. And the new view is—it is a long-looked-for view, but it has come at last—that it would be the quintessence of absurdity to hold that merely because the Statute did not expressly state the Prerogative was impaired to the extent of the subject-matter enacted, the Prerogative, after the enactment, remained in full force and could be put into operation regardless of the Statute.

Even the House of Lords revolts at absurdity. It is an attitude or example which some of our minor Courts would do well to apply to themselves.

In following out this conception of the Prerogative being only what is left of autocratic power in the Crown, the question arises whether, at all events, the Provinces of Canada invested with the Laws of England since 1850 or so—British Columbia for instance, and the three Prairie Provinces—have any right of incorporating their mercantile and commercial companies formed for purposes of gain by Prerogative. Manitoba still does incorporate thus. But the first Companies Acts in England which required all Mercantile Companies to be incorporated by the registration of a Memorandum and not by a Letters Patent Charter, goes back to the year or two before the reign of Queen Victoria. Since then Commercial Companies in England could not be incorporated by Letters Patent—that is, by any autocratic Prerogative Act.

I stated in one of my Articles that the King *solus*, without Parliamentary authority, could not incorporate a Mercantile Joint Stock Company to-day; and the reason was that the Prerogative had been abrogated by the enactments of Parliament requiring such Companies to be incorporated by a method devised by the Statute. So far as Companies covered by the Statute were concerned, the Prerogative was precluded.

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Is the Province of Manitoba progressing backward by re-erecting the Prerogative against Statutory Authority? Both it and the Dominion in their acts and conceptions, upon many fundamentals, frequently breathe the spirit of feudalism in its crudest form. And here, at least, is another specimen of inane reactionarism.

If the Revolution in England in the 17th century meant anything, and means anything to us to-day, it is that the Prerogative passed from the King *solus* under Parliamentary control, and every enactment of Parliament touching the erstwhile autocratic Prerogative dominates and controls it according to the terms of the Statute.

I am looking for new Editions of the Text Books on Canadian Company Law.

BRAM THOMPSON.

Regina, June, 1922.

NOTE.—Readers are referred to the notation of Notable Cases in the July issue, on the Judgment of the Court of Appeal, Saskatchewan, *Re Bank of Commerce* v. *Cudmore*, in which the Trial Judge following *Edwards* v. *Blackmore*, held that the doctrine of *ultra vires* had ceased to operate with respect to the powers of our Statutory Companies. This the Appeal Court Judgment reverses. First step on the return journey to rationality!—B. T.

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COMPANIES AND DOMINION AND PROVINCIAL LAWS.

By H. G. Garrett, Victoria, B.C.

(*Article* 2. *Continued from July Number*).

(5) POWERS OF COMPANIES INCORPORATED.

This subject is included here, because in the *Bonanza Case* it is laid down that—

"Actual powers and rights are one thing, and capacity to accept extra-provincial powers and rights is quite another."[88]

implying that capacity can be more extensive than powers and rights. Every person has a status, and as flowing from that a certain capacity, that is, the ability in law to contract and so forth. Both status and capacity are in the first place dependent on the authority possessed by any particular Government, and next on the laws enacted by it. The precise difference between capacity and powers is hard to analyze. "Capacity," the ability to do or have, seems to connote powers—"Powers," to denote the particular form or extent of capacity—the one a collective term expressing quality, the other distributive and quantitative. Under the memorandum system the effect of incorporation is that the company becomes "capable forthwith of exercising the functions of an incorporated company . . . with power to hold land . . "—that is, it is endowed with power to pursue its objects, to the extent permitted under the *ultra vires* doctrine: capacity and powers are exactly equal. In the case of the "chartered" type of company, although restriction of power or even prohibition may be imposed, capacity may (semble) still be unlimited. So far as the domestic orbit of jurisdiction is concerned, these conditions apply both to Dominion and Provincial companies.

[88] *Bonanza Case, ubi supra*, p. 583.

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The question for our present purposes has two practical aspects—(1) the powers of a company incorporated under the general powers of the Dominion and (2) the extra-territorial effect of incorporation in a Province. The powers which are derived directly from an enumerated head of sec. 91 over-ride all others. A Dominion railway can even expropriate the lands of a Provincial railway.[69] Again, in the case of banks, the expression "banking" has been held "to be wide enough to embrace every *transaction* within the legitimate business of a banker."[70] But even in cases of exclusive jurisdiction the powers should be confined to the actual purposes of that jurisdiction.

The powers of the non-exclusive class of Dominion companies seem to be controlled by the following principles—I would refer the reader also to the subject of "Rights" which follows:—

"The power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable and what limitations should be placed on such powers."[71]

"In the case of Dominion companies their Lordships, in deciding the case of *John Deere Plow Co.* v. *Wharton*, expressed the opinion that the language of sec. 91, head 2, could have the effect of *aiding* Dominion powers conferred by the general language of sec. 91."[72]

"But that power (sc: to regulate trade and commerce) can not be exercised in such a way as to trench in the case of such companies on the exclusive jurisdiction of the provincial legislatures over civil rights in general."[73]

And so, by way of example—

"Section 29 of the Companies Act of Canada which purports to enable a Dominion company to acquire and hold real estate . . . cannot prevail against any severable provision by a provincial legislature restricting the power of corporations generally to acquire or hold real estate in the province."[74]

[69] *Lachine, Jacques Cartier, etc., Railway Co.* v. *Montreal Tramways*, 18 Can. Rly. Cas. 133.
[70] *Tennant v. Union Bank* (1894), A. C. 31.
[71] *John Deere Plow Case, ubi supra*, p. 340.
[72] *In re Board of Commerce Act, etc., ubi supra*, p. 198.
[73] *John Deere Plow Case, ubi supra*, p. 340.
[74] *G. W. Saddlery Case, ubi supra*, p. 120.

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It may be observed that sec. 91 (2) has nothing to do with *incorporation* under the general powers of the Dominion, as has been mistakenly supposed in some quarters—it merely "aids" the powers of a company already existing. Legislation under this head must, however, not offend against the last principle of construction, set forth above (p. 469).

The first passage must obviously be read subject to the others quoted, and, it is submitted, refers to the constitution and government of a company *qua company* and not at all to the objects for which it is established, that is, *qua trader*. The question of prohibition and regulation is dealt with more fully later on.

The extra-territorial effect of powers is summarized as follows::

> "The limitations in sec. 92 . . . and in particular as to the incorporation of companies with provincial objects, confine the character of the actual powers and rights which the provincial Government can bestow . . . . to powers and rights exercisable within the province." [75]

It is suggested that this statement merely enunciates the general principle of private international law. No Government can bestow rights and powers which can be exercised in a foreign jurisdiction without consent express or implied. The only difference is that a sovereign authority can grant such a power in so many words, which on recognition of the company in the foreign jurisdiction at once takes effect. A Provincial Government in Canada can only grant the capacity to receive the power, implying that a further grant of power is required from the foreign authority. A Dominion company does not need such a further grant within Canada, but must it not be obtained, if the company goes outside Canada?

(6) RIGHTS OF COMPANIES.

We have seen that a corporation is a legal person and as such the subject of rights and that every state

[75] *Bonanza Case, ubi supra*, p. 583.

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may have a different law. In Canada a person may possess three sets of rights, as a Citizen of the Empire, of the Dominion and a Province. We are in reality concerned here only with the extent of jurisdiction belonging to the Provinces, since, speaking generally, Dominion rights must be either political, such as the franchise, or have their source in a specific article of sec. 91, and both kinds will oust or annul any conflicting enactment by a province. All other rights fall practically under "civil rights" and by virtue of sec. 92 are within the sole competence of the Provinces.

"It is to the legislatures of the Provinces that the *regulation and restriction* of the civil rights of the inhabitants of the Provinces have in general been exclusively confided and as to these the Provincial legislatures possess quasi-sovereign authority."[76]

"An abstract logical definition of their scope is . . . having regard to the scope of secs. 91 and 92 of the 'B. N. A. Act,' impracticable . . . the expression must be regarded as excluding cases expressly dealt with elsewhere in the two sections, notwithstanding the generality of the words."[77]

"Civil rights" means more than "such rights as flow from law . . . the status of persons . . ." and the words "are sufficiently large to embrace in thir fair and ordinary meaning rights arising from contract, and such rights are not included in express terms in any of the enumerated class of subjects in sec. 91."[78]

The extent to which these powers can be exercised by the Provinces may be illustrated by two cases. In the *Attorney-General for Ontario* v. *Attorney-General for Dominion* (1896), A. C. p. 364, it was held that a law which *prohibited* retail transactions and restricted the consumption of liquor in a Province concerned property in the Province, and also the civil rights of persons in the Province and was valid. A Province can even deprive a person of his property without compensation.[79]

In regard to Dominion companies, while—

"Section 91 enables the Parliament of Canada to incorporate companies with such statute and powers . . . as to restrict the

[76] *Re Board of Commerce Act, etc., ubi supra*, p. 197.
[77] *John Deere Plow Case, ubi supra*, pp. 339, 340.
[78] *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 109.
[79] *Nelson* v. *P. G. E. Railway Co.*, 25 B. C. R. 259, and *Commissioner of Public Works* v. *Logan* (1903), A. C. 363.

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provinces from interfering with the general right of such companies to carry on their business, where they choose," [80]

and

"The status and powers of a Dominion company as such cannot be destroyed by Provincial legislation." [81]

The powers of a Dominion company cannot "be exercised in contravention of the laws of the Province restricting the rights of the public in the Province generally." [82]

And therefore a Dominion company having powers to trade is "not the less subject to provincial laws of general application," and (by way of illustration)

"cannot refuse to obey the statutes of the Provinces as to mortmain . . . or escape the payment of taxes . . . and is subject to the powers of the Province . . . for the regulation of contracts generally." [83]

To some degree these powers can be exercised over "exclusive" Dominion companies, such as banks and railway companies—for instance, a Land Registry Act will apply to them. "General" Dominion companies have, it is submitted, no better right than an individual and, so long as they are not interfered with *qua* companies, their powers can even be nullified. How far the Provinces can go is a question that remains to be settled.

As an example of Dominion legislation encroaching on Provincial jurisdiction, we find that in the *Insurance Reference Case*,[84] section 4 of the Insurance Act, 1910, which purported to prohibit provincial companies from carrying on insurance business without a Dominion license, was held *ultra vires* because it

"Interfered with the civil rights (of the company) within the Province of incorporation, as well as with the power of the legislature of every other Province to confer civil rights upon it."

Over their own creatures the Provinces of course possess full dominion, except where the legislation is

[80] *G. W. Saddlery Case, ubi supra*, p. 114.
[81] *John Deere Plow Case, ubi supra*, p. 341.
[82] *Ibid.*
[83] *John Deere Plow Case, ubi supra*, p. 343, and *G. W. Saddlery Case, ubi supra*, p. 100.
[84] *Ubi supra*, p. 595.

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in conflict with a specific head of sec. 91, but the rights which can be conferred on them are merely territorial rights and the Provinces cannot interfere with civil rights outside their own boundaries.[85] Canadian and Provincial powers are sovereign only up to those boundaries. Hence it follows that the only objects—

"in respect of which the Province can confer actual rights are provincial objects."

"Rights outside the Province would have to be derived from authorities outside the Province."[86]

and a Provincial company having the proper capacity is then vested with "the ability . . . to accept powers and rights (in respect of objects outside the Province) if granted *ab extra.*"[87]

In conclusion it may be said that as a result of the *Bonanza* and *Great West Saddlery Cases* Provincial companies have all the rights they need, while Dominion companies *qua traders* or legal persons and residents of a Province enjoy no larger rights.

(7) POWER TO ENLARGE OR ALTER THE POWERS OF COMPANIES.

In the *Companies Reference Case* the fifth question submitted was this—

"Can the powers of a company incorporated by a provincial legislature be enlarged and to what extent. Either as to locality or objects by (*a*) the Dominion Parliament, (*b*) the Legislatures of another Province?

The Supreme Court gave a unanimous answer in the negative, the Chief Justice saying, "I am quite unable to see how the Dominion Parliament could invade the exclusive power assigned to the Provinces and either alter, extend or abridge a Provincial charter or *vice versa.*" Brodeur, J., expressed the opinion that "a company authorized by its charter to do a certain business could not be authorized by the country in which it operates to do another kind of

[85] *Royal Bank* v. *The King*, 9 D. L. R. 337.
[86] *Bonanza Creek Case*, *ubi supra*, pp. 578, 583.
[87] *Ibid*, p. 585.

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business. It is a question of capacity, and, by the rules of private international law, the capacity of a person is determined by the law of his domicile."

The Privy Council merely observed that it was "unnecessary to add to what is said at length in the *Bonanza Case.*"[88]

In that case Lord Haldane remarked that—

"If the company had no legal existence or capacity for purposes outside the boundaries of the Province conferred on it by the Government of Ontario, by whose grant exclusively it came into being, it is not apparent how any other Government could bestow on its rights and powers which *enlarged* that existence and capacity."[89]

In the *Insurance Reference Case* it is stated that—

"If a company seeks only provincial rights and powers and is content to trust for an *extension* of these in other provinces to the Governments of those provinces, it can at least derive capacity to accept such rights and powers in other provinces from the Province of its incorporation."[90]

It seems to amount to this that no jurisdiction can alter by enlargement or otherwise the status or capacity of a corporation, but it may recognize its powers and confer the right to exercise them and so extend them. Perhaps, if the corporation has the capacity of a natural person, a foreign jurisdiction could even permit it to exercise powers prohibited to it in its domestic jurisdiction.

The question has some practical bearing, because the Parliament of Canada has on several occasions passed Acts, purporting to give a Provincial company the right and power to carry on business throughout the Dominion as if it were a Dominion company.[91] It is submitted that such legislation has no validity, not only on the ground that one Government cannot enlarge the existence and capacity conferred by another Government, but also because it violates the principle that the Dominion can-

[88] *Companies Reference Case, ubi supra*, pp. 600, 602.
[89] *Bonanza Case, ubi supra*, p. 576.
[90] *Insurance Reference Case, ubi supra*, p. 597.
[91] See for an example of a general Act, the Insurance Act, 1917, sec. 4 (2) and (4).

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not interfere with the "power of the legislature of every other Province to confer civil rights," as quoted on page 535 (*ante*).

I take it, however, that such legislation as restricts a company to the exercise of certain powers only—for example, powers to do trust business or *vice versa*—is not within the foregoing principles. It does not affect the company *qua* company, but merely its ambit of activity.

(8) POWER TO DISSOLVE COMPANIES.

The general rule of law governing the dissolution of corporations is stated by Young[92] to be that "its personal law decides . . . under what circumstances the juristic person must be considered to have ceased to exist." Accordingly the Dominion and the Provinces respectively enjoy exclusive jurisdiction in this regard over their own creations, and can enact such provisions as they please for terminating the life of a company. Actual dissolution is entirely different from winding-up and bankruptcy which are matters within the sole competence of the Dominion. The effect of a winding up may be to leave the mere shell of a company, a body drained of all its vitality, but the company will still exist. What rules have been made in other Provinces I do not know, but it is submitted that Rule 60 of the "Winding-up Rules, 1906," in force in British Columbia, under which the Court may make an order that the company shall be dissolved from a certain date is *ultra vires*. In the first place that Act does not in terms refer to dissolution after a company's affairs are wound up, and secondly, if it did, it would, I think, trespass on the authority of the Provinces, so far as Provincial companies are concerned. It has been held that the Act applies only to commercial companies.[93]

Under the Companies Acts modelled on the Eng-

[92] Foreign Companies, etc., *ubi supra*, p. 102.
[93] *Langerin* v. *Stadium Co.*, 55 Que. S. C. 165.

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lish Act there is generally provision for dissolution of corporate existence after voluntary and Court liquidations, within the jurisdiction of a Province, and also after striking a company off the register. In regard to the latter method there is an *obiter dictum* in the *Great West Saddlery Case*,[94] bearing on the right of one authority to affect the existence of a corporation created by another.

> "If it is the intention and effect of the Saskatchewan Companies Act that a Dominion Company when registered in the Province shall . . . be liable to dissolution under sec. 29, the Act would be open to question on that ground.'" (Sc. as destroying the status and powers conferred on it by the Dominion).

The Dominion Companies Act and similar Provincial Acts provide expressly for forfeiture of a charter for non user; the Dominion and Manitoba Acts for failure to file the prescribed annual report; and the Ontario and Manitoba Acts for surrender of charters, while in Ontario Letters Patent may be revoked and cancelled by the Lieutenant-Governor-in-Council on sufficient cause being shown.

It was held in a Quebec case that every member of a corporation prejudiced on account of an abuse of the corporate powers is entitled to invoke the nullity of its existence as a corporation or to have a declaration by recourse at common law without adopting the special procedure of *scire facias*.[95] This decision would seem to be in harmony with the *Rendall* v. *Crystal Palace* case referred to on p. 486 (*ante*).

If, however, as is contended, dissolution is a matter only for the authority which creates a company, the grounds for and method of dissolution are only matters for suitable legislation. The effects of dissolution, for instance—where there are assets of a dissolved company undisposed of—raises other issues, which need not be dealt with here.

[94] *Ubi supra*, p. 123.
[95] *St. Narcissus Butter Co.* v. *Demers*, 50 Que. S. C. 6.

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(9) POWER TO PROHIBIT.

The vital issue in the *John Deere Plow* and *Great West Saddlery* cases was whether certain Provincial legislation, having the effect of prohibiting (*inter alios*) Dominion companies from carrying on their business was valid. In the *Insurance Reference Case* the shoe was on the other foot. It must be distinctly realized that the whole question of Dominion and Provincial powers to prohibit has not been raised in those or any other case. But various enactments of similar purport have been adjudicated upon from time to time, and certain principles have been laid down. How far then can the power be exercised by the Dominion and Provinces respectively over their own and other companies?

It may be noted that neither sec. 91 nor sec. 92 contains the word "prohibit," but inasmuch as the B. N. A. Act covers the whole field of self-government, the power must exist. It can be conceded that where the company falls within any specific head of sec. 91, except No. 2, Parliament alone can prohibit. No. 2 is excluded because the words "Regulation of trade and commerce" cannot imply "prohibition."[96] Is there also any federal power to prohibit included in the residuary powers? It is submitted that in general it does not exist, even as to a company incorporated under those powers, except where the Act or Charter in terms prohibits. There may be special circumstances such as are referred to in the *Board of Commerce Act, etc., Case,* which would supply a foundation for the legislation. But no source of the power can be discovered in Head 2 of sec. 91, and it has been held on various occasions that the Dominion has no power to regulate a particular business—a *fortiori,* it cannot prohibit. See, for instance, the *Insurance Reference Case,* where certain prohibitory provisions of the Insurance Act, 1910, were pronounced *ultra*

[96] *City of Toronto* v. *Virgo* (1896), A. C. 88.

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vires on the ground of interference with the status of Provincial companies (p. 534, *ante*).

By process of elimination and on the principles that there is no "hiatus" or "gap" in the constitution the general power of prohibition must then reside in the Provinces. Clement, in his work on the Canadian Constitution, says:—

"The local regulation and even prohibition of the liquor traffic, it is now settled, does not fall within Class No. 2 of sec. 91, and that decision (sc. *A.-G. for Manitoba v. Man. License Holders' Association* (1902), A. C. 73), authoritatively affirms a long line of cases in which the local regulation of particular trades, the exclusion of certain persons from them, and even their total prohibition by provincial legislation has been upheld." [97]

There is no infringement upon federal authority, whether it be a municipal by-law prohibiting "criers and vendors of small wares," or a law establishing a provincial monopoly of a public utility.

It is only a simple deduction that the Provinces can apply this broad principle to Dominion and other companies not *qua* companies or because they are Dominion companies but *qua* persons. An impression has been formed that the *John Deere Plow* and *Great West Saddlery Cases* place Dominion companies, as it were, on a pedestal, so that they can claim rights superior to the ordinary individual resident in a Province—a theory which is absolutely untenable. As Duff, J., well puts it,

"Nobody would argue that the Dominion could by the exercise of its residual powers pass laws in relation to a natural person or an unincorporated association of persons carrying on business in more than one Province which could have the effect of superseding . . . legislation (as regards such matters) of the Provinces." [98]

The statutes challenged were held invalid because they were not strictly laws of general application, as they dealt only with companies, and certain provisions were of a discriminatory and "indirect" character.

[97] 1916 ed., p. 690.
[98] *Companies Reference Case, ubi supra*, p. 434.

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In the *John Deere Plow Case* it is said—

"The question is not one of enactment of laws affecting the general public in the Province and relating to civil rights . . . but in reality whether the Provinces can interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carry with it powers conferred by the Parliament of Canada to carry on business in every part of Canada."[99]

Again, more emphatically—

Dominion companies "cannot be interfered with by any provincial law in such a fashion as to derogate from their status and their consequent capacities or as the result of this restriction to prevent them from exercising the powers conferred on them by Dominion law.'[100]

But

"the Ontario legislature has passed a Mortmain Act of general application, and in regard to that Act a Dominion company is in no better position that any other corporation which desires to hold land."[101]

And, put more strongly—

". . . if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion it might happen that it could do no business in any part of it, by reason of all the Provinces having passed Mortmain Acts, though the corporation would still exist and preserve its status as a corporate body."[102]

The defect in the legislation held *ultra vires* Provincial jurisdiction was stated thus—

"The effect of imposing upon a Dominion company a penalty for carrying on business while unregistered is to make it impossible for the company to enter into or enforce its ordinary business engagements and contracts until registration is effected, and so to destroy for the time being the status and powers conferred upon it by the Dominion."[103]

Observe how it is always the status and capacity of the Dominion company that is upheld and its general right, like that of any ordinary citizen, to carry on business. Suppose, however, a Province prohibited every person from carrying on business

[99] *Ubi supra*, p. 341.
[100] *G. W. Saddlery Case, ubi supra*, p. 100.
[101] *Ibid*, p. 119.
[102] *Citizens Insurance Co., etc., ubi supra*, p. 117.
[103] *G. W. Saddlery Case*, p. 123.

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without a license, would a Dominion Company be in a "better position?"

As regards companies formed in other Provinces it would seem that one Province can by refusing to grant "rights and powers" to a company coming from another Province virtually prohibit it from doing business within its boundaries. The position of foreign—extra-Canadian—companies is discussed later.

A further complication is introduced where the prohibition affects not only extra-provincial companies, but inter-provincial trade. The point is not strictly relevant for our present object, but Clement (at p. 693), says—

> "The fact that provincial legislation may prejudicially affect trade and commerce does not operate to prevent the full exercise of the powers conferred upon provincial legislatures. For example, the right of the provinces to prohibit the export of timber cut upon Crown lands and their right to enact local prohibition, despite its obvious effect upon inter-provincial trade, have been recognized as beyond question."

In so far as a Province can legislate concerning inter-provincial trade, and the writer believes that these powers are wider than is generally supposed, companies, including "general" Dominion companies, would be affected in their operations to the same extent as individuals.

(*To be concluded in September issue*).

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OUR LONDON LETTER.

By Frank Gahan, M.A., LL.B. (Lond.), B.C.L. (Oxon) of the Inner Temple, Barrister-at-Law.

In England, as in other countries, there has been since the war a marked increase in the number of indictable offences committed. It is a common-place with historians that war has a brutalizing effect in the sphere of morals, just as it has a paralyzing effect in the sphere of economics. Moral and economic factors naturally react on each other, and both have without doubt added volume and force to the crime-wave which has swept over this country during the last two or three years. At the moment, however, an alaysis of final causes is of less interest to the public than the determined efforts which are being made by the police and the judiciary to enforce the criminal law with vigour against all offenders.

The three most alarming aspects of the problem are that there has been a great increase in the number of crimes by juvenile offenders, a great increase in the number of crimes of violence, and a great increase in the gravest crime of all—murder. And, perhaps, the worst feature is that in a great many of these murders there seems to have been no motive even remotely adequate.

Some Recent Murders.

A boy of 14, living with his parents in a mining village in Wales, was recently charged with the murder of a little girl a few years younger than himself, and, on his acquittal, the entire population of the village turned out to welcome him home; within a few days the little daughter of another neighbour was murdered in such circumstances that the boy could not possibly deny his guilt. In neither case was there any apparent motive beyond the blind desire to kill. Another boy, about 16 years of age, murdered the landlady

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of a lonely inn near London for the sake of a few pence. Still more recently, a youth of 18, named Jacoby, was convicted of murdering Lady White, one of the guests in the London hotel where he was employed as a pantry-boy; he entered her room in the middle of the night, bent on petty theft, and when she woke he battered her head in, in the hope of escaping detection. Under the eyes of a policeman, in the east end of London, a girl was induced to drink poison and was then, to silence her screams, pushed into a canal by her lover. An unemployed man who had been drawing, in fraud of the Government, an allowance for a paramour, deliberately slew an old woman who reported his real relations with the woman. An educated woman, who put an advertisement in the *Morning Post*, seeking a situation as a lady-cook, received a reply by telegram asking her to come by a certain train to an address in Bournemouth, a seaside residential town; on the arrival of her train she was met by a uniformed chauffeur, who drove her away in a large private automobile, but at day-break next morning her body was found in a field three miles from Bournemouth, and the nature of the injuries showed that after a severe struggle she had been beaten to death by some heavy iron implement. The name and address given in the telegram were bogus; and it was soon discovered that, within the few preceding days, the same chauffeur had sent other decoy telegrams asking for young nurses or governesses to be sent, giving in each case fictitious names and addresses.

The two murder cases which aroused the greatest public interest, however, have been *Rex* v. *Armstrong* and *Rex* v. *True*. Armstrong, who was a Solicitor of the High Court, a Major in the Territorial Army, and the Clerk to two benches of magistrates in the West of England, was arrested on the charge of attempting to poison, by the administration of arsenic, a brother solicitor named Martin, practising in the same village.

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After his arrest, the body of his wife was exhumed and it was discovered that she had died of arsenical poisoning; and accordingly he was charged with the murder of his wife, convicted and executed. An even more sensational case was that of Ronald True, an impudent ne'er-do-well who was at one time a member of the Canadian North-West Mounted Police, and who is said to be the son of a woman of title whose name has not been disclosed. He was convicted of having murdered, in the most revolting circumstances, an unfortunate woman of the town, apparently with no other motive than to steal her little stock of personal jewellery.

Speed of English Justice.

The judges have on several occasions impressed on Grand and Petty Juries the need for an unflinching enforcement of the law. The speed and certainty with which the machine of criminal justice moves in England is doing much to stem the tide of violence, especially as the sentences where the judges have a discretion are becoming more severe. In murder cases, more time is necessarily taken because of the practice, which seems now to be confirmed, of appealing against every conviction. Yet even in so complicated and difficult a case as Armstrong's, where there was a strong possibility of appeal to the Lords, the penalty followed hard on the detection of the crime. He was arrested on 31st December, and on that date the crime for which he was convicted was not even known to have been committed. It was on 19th January that he was formally charged with the murder of his wife; and, although an unusually long time elapsed between his conviction and his appeal, and while a further appeal to the House of Lords was being considered, the catastrophe of the drama was reached within five months, for Armstrong was hanged on 31st May. In London, where eleven sessions are held at the Old Bailey every year, the course of justice is even swifter. Thus Jacoby, who murdered Lady White on 14th

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March, was detected and charged with the crime on 20th March, and was hanged on 7th June. There can be no doubt that this speed in the bringing of offenders to justice is a very important deterrent. Everyone who has experience in the administration of the criminal law is agreed that the certainty and the speed of retribution are infinitely more effective than mere severity in the matter of sentences.

The Armstrong trial revealed one weakness in the Criminal Appeal Act of 1908. The case was considered of such importance that the Attorney-General personally appeared for the Crown both at the trial and on appeal. Further appeal to the House of Lords can only be made if the Attorney-General certifies the case to involve a doubtful point of law of general importance, and the granting of certificates is discouraged. (See, for instance, the remarks of Lord Sumner in *Thompson* v. *The King* (1918), A. C. 221, at 236. The Act, however, obviously did not contemplate the Attorney-General as an advocate in the case. Sir Ernest Pollock refused Armstrong's request for a certificate, but it is understood that, instead of exercising his own judgment, he acted as the Solicitor-General advised. The position was further simplified by the opinion of the Court of Criminal Appeal that the case involved no new law.

Evidence of Other Crimes.

An important part of the evidence against Major Armstrong on the charge of murdering his wife was directed to show that, after his wife's death, he had made several attempts to administer arsenic to his fellow solicitor, Mr. Martin. The rule, well settled since *Makin* v. *Attorney-General for New South Wales* (1894), A. C. 57, is that such evidence can be given to prove design, system, guilty knowledge or criminal intent, or to rebut a defence of accident. On Armstrong's behalf, it was argued that a subsequent act could not be used to show design of system or the intent of a prior act; and further, that it could not

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properly be admitted to rebut a defence of accident, for the simple reason that this defence was not raised. Indeed, the Attorney-General dealt with the Martin incidents when first presenting the case to the jury, before any particular defence was indicated; and when Sir Curtis Bennett opened the prisoner's case, he showed that the defence was not accident, but suicide. Hence, it was urged that the only purpose of the evidence was to suggest that the prisoner was of a character likely to have committed the crime charged against him; and for that purpose its admission would obviously have been grossly improper. Mr. Justice Darling nevertheless admitted the Martin evidence and thus destroyed any chance of an acquittal that the prisoner might otherwise have had. The Court of Criminal Appeal thought that the case was covered by the view of Pollock, C.B., in *Regina* v. *Geering* (1849), 18 L. J. 215 M. C., and that the evidence was admissible to show that the arsenic which Mrs. Armstrong admittedly took was designedly given to her by her husband. The point had been much debated among lawyers, and there was general satisfaction that the Court was able to reach this conclusion and to affirm a just conviction without resort to section 4 of the Criminal Appeal Act. That section enables the Court of Criminal Appeal to affirm a conviction despite irregularities in the trial, provided no substantial injustice has thereby been done. The older school of lawyers view with instinctive dislike the readiness with which the Court of Criminal Appeal has sometimes availed itself of the power conferred on it by this section.

Insanity and Crime.

A legal question of much graver importance was raised by the case of Ronald True, who was tried before Mr. Justice McCardie. The prisoner pleaded "not guilty" and his counsel, Sir Curtis Bennett, raised the defence of insanity. The evidence given for the defence by the prison doctors left no doubt

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that he was insane, but the Crown contended that his insanity was not of such a kind as to relieve him from legal responsibility. He knew he was killing the woman; he knew it was wrong so to do; he knew his act was punishable by law; and, most significant of all, he took elaborate steps to conceal his crime and to fabricate a defence. Mr. Justice McCardie tried in vain to get from the medical witnesses some practical test satisfactory to physicians which would establish alternative rules to those laid down by lawyers in the McNaghten case. His elaborate summing up paved the way for a reconsideration on appeal of the whole relationship between insanity and crime; but in true legal fashion he made it clear that insanity does not absolve a man from responsibility for crimes that are unconnected with the mental disease from which he suffers. The jury, to the public satisfaction, found True guilty, and he was sentenced to be hanged. The Court of Appeal tacitly declined Mr. Justice McCardie's invitation to reconsider the rules laid down in McNaghten's case, and contented itself with affirming the verdict and sentence.

Immediately the endless dispute between the doctors and the lawyers broke out in the columns of the *Times*, the protagonists being Mr. Maurice Craig on the medical side and Sir Herbert Stephen on the legal. Meanwhile Mr. Shortt, the Secretary of State for Home Affairs, acting under the Criminal Lunatics Act, 1884, appointed a committee of eminent doctors, including Sir Maurice Craig, to report on True's mental condition. The committee unanimously reported him to be certifiably insane. Mr. Shortt thereupon reprieved True and ordered him to be detained as a criminal lunatic. In taking this step, the Home Secretary was acting as the Statute intended he should act; and, indeed, it is a question whether the terms of the Statute did not compel him in the circumstances to grant the reprieve.

Unfortunately the decision to spare True followed immediately on the execution of the lad Jacoby whom

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the jury had recommended to mercy and to secure the commutation of whose sentence strong efforts had been unsuccessfully made. There was an immediate howl of public indignation at True's reprieve, and the newspapers were unanimous in declaring that he should have been left to his fate. The ultra-Tory *Morning-Post* and the Labour *Daily Herald* were at one. Jacoby and True were contrasted, the former white-washed, the latter, perhaps not vilified, but presented in his true colours. It was declared that Mr. Shortt was not bound to act on the finding of the committee and that, as the *Times* put it,

> He has done so in this case in defiance of the verdict of the jury and of strongly expressed judicial comment. He has done so, indeed, in contempt of public sentiment and of that righteous indignation which springs upon such occasions almost unconsciously for the protection of civilized society . . . the *Criminal Lunatics Act* seems to have been a yielding to pathologists which is no contribution to the welfare and economy of our social system.

From the standpoint of the law it is satisfactory to know how entirely the public endorse Mr. Justice Darling's direction in the trial of Perry (see 14 Cr. App. R. 48) that "the law of England as to the sanity of a prisoner is laid down in the King's Bench and not in Harley-street"—Harley street, as every visitor to London knows, being one long line of brass plates bearing the names of eminent medical specialists.

The newspaper correspondence on the subject has revealed much loose thinking. The law is concerned with insanity in various ways, and these ways are often confused. In the first place, whether or not a person is insane, is a question of fact, and therefore a question for the jury. Expert opinion may guide the jury, but cannot control or overrule it. The older generation of novel readers will remember "Hard Cash" and other novels of Charles Reade in which the plot turns on the right to have the question of sanity determined by a jury, however many doctors may be induced to certify a patient as insane. In criminal, as in civil law, the jury have that right. If

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necessary, the jury will hear evidence and decide whether, through insanity, a prisoner is unfit to plead. No question of guilt or innocence is there involved. Similarly, where insanity is pleaded as a defence, the jury will on the evidence decide whether insanity has or has not been proved. In reaching this decision, the jury may accept or reject the medical view. Lombrosa and his followers in Italy and America would hold all criminals to be insane; and physicians under the influence of Freud would testify to the insanity of almost any man who was in the least eccentric or lacking in self-control. But an English jury, which can generally be relied on to take a sturdy common-sense view, is not at all likely to give effect to such fine-spun theories.

When a man is insane in the eyes of a jury, but yet fit to plead, there remains the question of the effect of the insanity on his criminal responsibility. An admittedly insane person may be held responsible for acts in the doing of which he is unaffected by his insanity; whereas he may be regarded as not responsible for other acts, the nature and quality of which his mental disease prevents him from knowing. From the legal standpoint the McNaghten rules have stood the test wonderfully well. It is unfortunate, however, that a contrast is so constantly drawn between legal and medical insanity. The McNaghten case lays down tests to determine not the sanity of a prisoner but his criminal responsibility, and those principles are effective, however mad he be. They are not directed to medical but to exclusively legal conceptions. It is a grat pity that this distinction is not more clearly understood by parliamentary speakers and by writers in the lay press.

Mr. Shortt's Future.

The storm of criticism which was directed against the head of Mr. Shortt for his action in reprieving True was renewed with increased violence a few days later when the murder of Field Marshal Sir Henry

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Wilson was attributed by many to the fact that the Home Office had neglected its obvious duty of providing him with police protection. In his defence it was stated that special police protection had been withdrawn, not from Sir Henry Wilson alone, but from all persons who had been connected with the Irish crisis, with the exception of Lord Carson and Sir Hamar Greenwood, the Chief Secretary. This defence did not appease Mr. Shortt's numerous critics in Parliament, but the incident has given renewed life to the rumour that he will shortly desert the dust and turmoil of political life for the peace and dignity of judicial office. It is generally expected that Mr. Justice Bray, who is eighty years of age, will retire from the King's Bench during the long vacation and that he will be succeeded by Mr. Shortt. In that event, the many English and Canadian friends of Sir Hamar Greenwood, Bart., K.C., are confidently hoping that he will be given the seals of office as Secretary of State for Home Affairs.

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NOTABLE CASES NOTATED.

Divorce; Gestation Period as Evidence of Adultery.

It is not often we get a Judgment for the Lord Chancellor as Judge of first instance, nor often that we encounter a case so phenomenal as that of *Gaskill* v. *Gaskill*.[1] The facts briefly were that the Respondent (wife) had given birth to a male child on September 1st, 1919. The last possible date on which the Petitioner (husband) could have had access to the Respondent was the 4th of October in the previous year. That was a period of 331 days. There was no evidence or even allegation of adultery beyond the abnormality of the period, and the suggested impossibility of the husband being the father of the child.

The King's Proctor was directed to intervene and the Attorney-General attended also as *amicus curiæ*.

A great array of Expert Medical opinion and experience was produced. The case of *Bowden* v. *Bowden*[2] was cited as one very much in point. It was decided by Mr. Justice Horridge. There it appeared there was no evidence of adultery apart from the length of pregnancy; and that the last access of the husband to the wife was on December 19th, 1915. The next day he went to Egypt on military service; and the child was born on October 22nd, 1916. This was a period of 307 days. Medical Evidence in that case showed that the average period of pregnancy was 275 days, and the normal duration from 273 to 280 days, but that there were indisputable instances where pregnancy lasted 298, 306 and 309 days. With this evidence the Judge had no alternative but to hold the wife innocent.

In the present case of *Gaskill* v. *Gaskill* the Expert evidence of Professor Briggs proved a known

[1] (1921), L. J., Vol. 90, p. 339.
[2] (1917), 62 S. J. 165.

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case of gestation prolonged to 306 days; and he said though prolongation of the gestation to 331 days is improbable, it is not impossible.

Dr. J. S. Fairbairn also gave evidence that two or three menstrual discharges are not inconsistent with pregnancy, "for the changes in the lining of the womb may not be sufficiently complete to check the menstruation until after the third month." He said later hemorrhages could be accounted for otherwise. They might not be genuine menstruations, etc. The sizes of children where there had been prolonged gestation were also reckonable. Generally they were larger and more developed; but they were not phenomenal.

Dr. Playfair, it was pointed out, in his book vouched for four reported cases where the period of gestation was 336, 332, 319 and 324 days.

The Lord Chancellor decided that these cases, taken with the consideration of the absence of any other evidence of adultery, rendered a verdict incumbent on him him in favour of the Wife; and he decreed accordingly with a high-spirited appeal to both husband and wife to regard their litigation as the result of misunderstanding, and to readjust themselves to the inevitableness of a life-long matrimonial tie. It was admirable as noble in sentiment as in language, and it is to be hoped that it has evolved a reconciliation.

Vendor and Purchaser; Leasehold Premises out of Repair.

Lockhart v. *Rosen*[3] is a case of great importance to Lessees and to Vendors and Purchasers of Leasehold Property. The action was one for Specific Performance of a Contract of Sale of Leasehold Property. The Lease was for a period of 50 years from 1886 and the rent was £85. To any assignment of the Lease the consent of the head Landlord was required.

The Purchase, after some negotiation, was agreed to at the price or sum of £150 "subject to the consent

[3] 91 L. J. C., p. 321.

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of the Superior Landlord and to the premises being taken in their present condition."

At the time of the agreement no notice to repair had been served by the Superior Landlord, but it was known to both the Lessee and the Purchaser that the premises were in bad condition.

The Superior Landlord refused to give his consent till the repairs required by his notice had been made. That was in January. Between that and June the repairs were made by the Lessee (Vendor) and then he sued the Defendant as Purchaser under the Contract for Specific Performance and for payment of the amount expended in repairing the premises.

Astbury, J., in deciding for the Plaintiff, stated that though there was no clause in the Contract providing for the Plaintiff making a good title, the stipulation was implied as an obligation incumbent on every Vendor and was incumbent on the present Vendor except in so far as he was relieved by the provisions of the Lease requiring the Consent of the Superior Landlord. That consent was indispensable, and it could not be procured without doing the repairs; and the doing of the repairs was in the form and express terms of the Contract, an obligation incumbent on the Defendant, the Purchaser.

The Purchaser became in equity the Owner from the date of the Contract. The Contract gave him the property from its date, and after that the Vendor was in a Trustee relationship to the Purchaser.

A number of cases were quoted to show that when a Vendor expressly contracts to produce a good title he is bound to do so, though the purchaser at the time of the sale was aware of a previous breach of Contract impairing the title. But where there is no express Contract to make a good title and the purchaser has notice at the date of the Contract of a breach of the Vendor's obligations under his Lease, he cannot rely on this breach as excusing him from the Performance.

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The cases on this question are summed up in *Taunton* v. *West of England P. B. Society.*[4] But *Lockhart* v. *Rosen* differs from them in this: that the Purchaser had inspected the Premises, and knew their condition, and bought and became in Equity owner of them "in their present condition." Whatever had to be done after that to preserve the term of the Lease was as between the Lessee and the Vendor or proposed Assignee, performable by the Purchaser under the express stipulations of the Contract.

Divorce; Sterility no Ground for Nullity.

In re L. v. *L.*,[5] the moot question received a final quietus—whether the incapacity of a Woman to conceive is ground for a Decree of Nullity of marriage. The almost isolated case of *D.* v. *A.*, falsely calling herself D., 1 Rob. Ecc. 279, was considered and applied, though its facts were radically distinct from those in *L.* v. *L.* In the present case of *L.* v. *L.*, not only was conception impossible but penetration was only possible to a limited and imperfect extent, and real consummation of the marriage was repugnant to the respondent who had been rendered sexless by an operation performed before marriage—an operation of which she was aware as well as of its consequences, and which she concealed from her husband.

The general rule—a healthy and wise rule—is that mere sterility is no ground for annulling the marriage. But the defect is generally unknown and unsuspected by both parties. While in the case of *L.* v. *L.* the defect was known to the Respondent and concealed by her. It is certain if she had disclosed it the marriage ceremony would never have been gone through. The defect was radical; and if such a flagrant instance of deliberate suppression of essential and presumed conditions were made in the case of an ordinary contract, the other party or the victim of the suppression would be, without a doubt, free from the obligation

[4] (1912), 81 L. J. Ch. 690: 2 Ch. 381.
[5] 38 T. L. R., p. 697.

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imposed upon him by something not short, in any way, of fraud.

Mr. Justice Horridge however held, though avowedly much against his inclination and assuredly much against his sympathy, that at the most the case was one merely of sterility, and that the marriage could not be annulled.

N.B.—It is time to alter the law by statute. Why should a woman defective to her knowledge foist herself upon a man as his wife by manifest and deliberate fraud?

Master and Servant; Workmen's Compensation Act.

Harrison v. *Wythemoore Colliery*[6] is a case of importance where an accident causing death occurred. An action was brought at Common Law for damages incurred in certain Railway shunting operations; and on the Trial before the County Court the Judge on the application of the Plaintiff, after finding against the claim at Common Law, assessed the damages under the Workmen's Compensation Act, there being no doubt of the right under that Act which excluded all questions of contributory negligence and awarded the compensation for all injuries in the course of the employment.

It appears that the County Court Judge assessed the damages under the Workmen's Compensation Act without prejudice to the Plaintiffs' right of Appeal from the judgment against her. She did appeal and again lost, and the question arose whether the exercise of the right of Appeal in the Common Law action was not such an election of a remedy as precluded the claiming of compensation under the Workmen's Compensation Act.

The Court of Appeal held the assessment of damages was legal, but that the reservation of, or the making of it subject to, the right of appeal in the Common Law action, was beyond the authority or jurisdiction of the County Court Judge. The appeal, therefore, was dismissed, leaving the assessment of damages under the Workmen's Compensation Act.

[6] 38 T. L. R. 694.

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Railway Carriage of Goods; Owner's Risk.

Smith v. *G. W. Railway*[1] is a case of great interest and importance. The facts are:

The Plaintiff delivered to the Defendants a parcel containing 6 pairs of boots to be carried by the Defendants from Birmingham to Walton at "Owner's risk," the Company not to be liable for loss, damage, misconveyance, misdelivery, delay, or detention of the goods except upon proof that such loss, etcetera, arose from the wilful misconduct of the Defendants' servants.

The parcel was not delivered to consignee and was never traced beyond the Railway Company's collecting office at Birmingham.

Nineteen days after the delivery of the parcel to the Defendant Company the Plaintiffs complained of its nondelivery, and the Defendants replied the matter would have immediate attention, but no more was heard of it for 3 months. They then enquired of the Defendants what had become of the parcel and shortly after their Solicitor threatened proceedings.

The Defendants replied the whole had been lost in transit and a definite reply would be given as soon as possible.

In answer to interrogatories the Defendants said they had no knowledge as to whether the parcel had been despatched from Birmingham or received by their Servants at Wilton; and that it was lost.

At the trial the Plaintiff proved the terms of the Contract, the packing properly of the parcel and its delivery to the Defendants' servant. The Defendants called no evidence but submitted there was no case for them as no evidence of wilful misconduct had been given against them.

The Court of Appeal (Bankes and Scrutton, L.J., Atkin, L.J., dissenting) held that the inference could not properly be drawn from the Evidence that the loss of the parcel arose from the wilful misconduct of

[1] L. T. R., Vol. 127, p. 1.

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the Defendants' servants and that the Defendants were not liable.

The House of Lords (Atkinson, Buckmaster, Sumner and Wrenbury) held that the Owner's risk clause threw upon the Trader before he could recover the burden of proving that the loss arose from the wilful misconduct of the Company itself or its servants. The fact that the Railway Company had no explanation to offer as regards the loss of the parcel did not afford Evidence which would enable the Trader to discharge the onus of proving an act of wilful misconduct on the part of the Railway Company's servants.

N.B.—We draw attention to and repeat the notes on this case when it was just decided by the Court of Appeal, C. L. T. (1921), vol. 41, p. 71.

The law should be amended providing that where the carrier does not account at all for the goods, either through defiance or negligence, the presumption is that the goods have been lost through the wilful misconduct of the carrier's servants, and that it is only after accounting in some way for the goods the onus is shifted unto the owner of proving that they were lost through "wilful misconduct" of the carrier.

There is a masterful decision to this effect in *Curran* v. *Midland G. W. Railway*,[8] delivered by Chief Barron Palles, one of the greatest jurists of the last and present century. But the English Court does not see its way to follow this. So that the rule works out justly in one country and unjustly in the other.

Landlord and Tenant; Option of Perpetual Renewal.

Grey v. *Spyer*[9] is a case between Landlord and Tenant which resulted in a dissent by the Court of Appeal from a Judgment of Younger, L.J., sitting as an additional Judge in the Chancery Division for Astbury, J.

It therefore presents from a judicial aspect a feature we seldom encounter. An Appeal Court Judge sitting *pro tempore* as a Judge of first instance, and the judgment given by him in that capacity dissented from and over-ruled by his brethren of the Court of Appeal, Lord Sterndale, M.R., Warington, L.J., and

[8] (1896), 2 Ir. Rep. 183.
[9] 1922, Ch. Div., Vol. 2.

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Scrutton, L.J. But even then the Court of Appeal did not see its way to render relief to either party, but made a declaration of the construction of a Tenancy Agreement, and as neither party had claimed by his pleadings the appropriate relief on that construction, left each of them to such future proceedings as he might be advised.

It seems to get us back again into the epoch of special pleading. The facts are these:—

Mrs. Styles, an elderly lady, was in 1917 tenant of premises under a lease expiring in 1975. In March, 1917, she sublet to Mr. Spyer, a Solicitor, the second and third floors for one year from 25th March, 1917, with an option to Mr. Spyer to continue on the same terms as a tenant for 2 years from 25th March, 1918, on giving two months' notice to the Landlady, Mrs. Styles, of his intention so to continue. When the time expired Mr. Spyer was not anxious to bind himself for 2 years, and he proposed to continue for one year from 25th March, 1918, with an option to him of continuing for a further year from 25th March, 1919, on giving 2 months' notice before that date. This proposal was accepted. On the 23rd January, 1919, a written agreement was signed. It recited the tenant was prepared to continue the tenancy for a further year from 25th March, 1919, if the Landlord would give him an option to continue the tenancy after March 25th, 1920, from year to year provided that each year before March 25th the tenant gave one month's notice of his intention to continue. The Agreement then provided (1) that the tenant exercised his option to continue the tenancy until March 25th, 1920, (2) that the Landlord granted the option to continue the tenancy after March 25th, 1920, from year to year, provided that each year before March 25th the tenant gave one month's notice in writing of his intention to continue, and that in the event of the Tenant desiring to put an end to the agreement on any 25th March he should give 2 months' notice of his intention.

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In August, 1920, the Plaintiff in the action acquired from Mrs. Styles the interest in the Lease—that is, both her own head Lease and her rights under the Sub-lease to Spyer; and on the 21st September, 1920, he gave to Spyer, the Defendant, notice to quit on the 25th March, 1921.

This notice Defendant disputed; and on the 6th of January, 1921, he gave the Plaintiff, Grey, notice that he exercised his option to continue for another year.

The action followed, claiming (1) a declaration that Defendant was not entitled to a right of perpetual renewal; (2) a declaration that the Plaintiff's notice to quit was effective to determine the Tenancy on the 25th March, 1921. The Defendant counterclaimed that he held as tenant from year to year with the right of perpetual renewal during the whole term of the head Lease.

Younger, L.J., held that the option, when once exercised, created a tenancy from year to year with the ordinary incidents including the incident of the Landlord's right to terminate the tenancy by a six months' notice; and that the tenancy was so terminated in fact.

The Court of Appeal held that the true effect of the agreement was to extend the option to continue, at its date limited to one year, to a succession of reversionary terms each for one year certain provided the requisite notice was given. It did not create a tenancy from year to year.

The Judges all pointed out that the Plaintiff did not ask for possession and that the Defendant did not ask for specific performance; and a fact that transpired before the Court of Appeal was overlooked on the trial before Younger, L.J. It was that after the Plaintiff had given the six months' notice to quit, he had accepted rent and had given an absolutely unqualified receipt, and that was in law a waiver of the notice to quit upon which the Plaintiff's right to possession would have rested even if his contention as to the nature of the tenancy had been sustained.

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So the case became abortive. But Scrutton, L.J., at the end of his Judgment and in view of future proceedings, made some remarks which are illuminative.

He said (1) he disagreed with the construction of the Agreement by Younger, L.J.; (2) that Spyer had when the Agreement was signed a tenancy for a year certain with an Agreement by the Landlord to grant a second year's tenancy on the same terms if he asked for it by a given date; such second year's tenancy being accompanied by similar agreement for a third term and so on. This, he said, was not a tenancy from year to year as defined by Park Baron in *Oxley* v. *James*,[10] and terminable by six months' notice on either side. In this case, *Grey* v. *Spyer*, the tenancy expired as of course unless some one gave a notice. Plaintiff contended the tenancy was a tenancy from year to year terminable by the Landlord at 6, and by the Tenant at 2 months' notice. But Mr. Justice Scrutton says how does that fit into the option given to the Tenant to continue on one month's notice. The Plaintiff said this option could only be exercised if the Landlord had not given a notice to determine.

He concludes: If I am simply to construe the words of the agreement it contemplates a year's tenancy, continuing from year to year at the tenant's will expressed one month before the end of each year. The continuation depends on an agreement to grant, and it is an equitable and not a legal right. It might involve a right of perpetual renewal at the tenant's option and that the Courts leaned strongly against such a construction of an Agreement unless the words were constraining in their effect.

In this case the opposite construction also involved absurdities from which the Court would recoil; and he abstained from saying whether the agreement was one which the Court would enforce specifically—injustice on one side and absurdity on the other. But he made it clear that a Solicitor was in a dubious posi-

[10] (1844). 13 M. & W. 209.

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tion in getting an Old Lady without independent advice to sign an Agreement for a tenancy which at the option of the Tenant alone, and despite any act or notice on the Landlord's part, became by a one month's notice preceding the termination of each year a perpetual tenancy or a tenancy renewable each year for an additional year *in perpetuum.*

I would submit it is an Agreement no Court of Equity could or would enforce.

B. T.

BOOK REVIEWS.

The Canadian Railway Act, 1919-20 with Notes of Cases decided, including decisions of the Board of Railway Commissioners respecting Telephone, Telegraph and Express Companies, by Angus MacMurchy, K.C., and John D. Spence, Barrister-at-Law. Toronto: The Canada Law Book Company, Limited.

This is the Third Edition of a well-known work, and it has been rendered necessary by the manifold decisions since 1911 when the former Edition was published, and by the revision and consolidation in 1919 of the Railway Act itself.

As a matter of fact this is not merely a new Edition but in many respects it is a new work . Largely it is re-written. The contour of the original is preserved, as well as the logical arrangements of the Law and of the Judicial interpretations of the Act from time to time rendered. These were the characteristics of the first two Editions; and they are equally so of the present work.

The Authors have adopted the System, insurpassable in works of this description, of printing the Act section by section, and expounding it section by section, in a spirit of thoroughness, and with a clarity of language which impress themselves upon the reader or consultant of this splendid work. Throughout we never lose touch with the indomitable personality of the Authors in their determined effort to produce a masterpiece. We must say they have achieved

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it; and the work to-day is not only the standard work, but it is an indispensable to every Lawyer whose practice brings him into contact with Railway Companies or Telephone, Telegraph, or Express Companies.

Their powers, their duties, their rights and obligations as well as the rights of others dealing with these Companies are described in a manner we have seldom seen surpassed. While the wealth of Cases would be unique were it not that it is in harmony with all the rest of the Book.

There is an admirable Table in the front showing in parallel columns where the Sections of the Old Act (R.S.C. 1906, ch. 37) and its amendments, appear in the New Act (1919, ch. 68). This is followed by a Table of Contents; and these two combined with an admirable and exhaustive index render the work ideal in the sense of being readily accessible to its consultants. It is so seldom that we find these valuable accessories to really great works of constant reference, that we feel it necessary to indicate their presence here; and to congratulate the Authors and the various Barristers who have co-operated with them upon the perfection with which they have performed this part of their great undertaking.

The Book we may say is printed and bound in a manner which makes it agreeable to the reader; and a great deal more of the success or acceptability of a book depends upon this than is generally thought. However, the feature is present in this Book; and we trust its success will be commensurate with its great and undoubted merits.

B. T.

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The Canadian Law Times.

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EDITORIAL.

Reform in County and District Court Procedure.

Sir Frederick Haultain, the Chief Justice of Saskatchewan, on a recent occasion at a Bar Meeting, suggested the feasibility or desirability of inaugurating in the County and District Courts of the various Provinces of Canada—in the Inferior Courts by whatever name they are called—the system of procedure in Civil actions which exists in the County Courts of England. It is an admirable suggestion; and it is not merely feasible but it is desirable. I would go even farther than that and say, if it were possible to draw a line with any precision, the suggestion should be carried into operation with reference to a large percentage of the cases in the Superior Courts, by whatever name they are called, of every Province of Canada.

I do not pretend to say whether it is a temperamental pugnacity in the Canadian people or a bantamimic propensity for wing-flapping and crowing on the part of the smaller element of the Law, but the Courts, both Superior and Inferior, are glutted with cases which should never have been there, and which could be promptly and summarily disposed of by bringing the parties face to face with one another. That desideratum should be the aim of all rules.

The power of making rules of procedure is a great function generally conferred on the Judges; but it is a mere travesty for the Judges entrusted with the duty

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in Canada to pretend that they discharge it as regards the Inferior Courts, when they merely apply to them, *mutatis mutandis,* the rules of the Superior Courts. A thousand times better it would have been if they had done for the Inferior Courts what so generally has been done with regard to the Superior Courts in Canada—applied to them, *en bloc,* the English Rules, Instead of that they gave the Inferior the same rules as the Superior Courts; and a worse thing they could not have done.

Whether it was done in the interest of the raw practitioner so as to teach him what he should have learned as a student, it is certain it has wrought wrong of every kind to the public and even to the Legal Profession. It is merely caricaturing the administration of justice to provide that for a debt or claim of $500.00 or less (generally less than $250.00), the parties have to go through all the formalities and expenses of filing Statements of Claim and Defence, approved by Counsel, and of Examinations for Discovery, with all the attendant delays to the litigant, and arduous detail work to the Solicitor, for which no adequate remuneration can be provided simply because the work is out of all proportion to the amount involved.

To the dishonest, evading and prevaricating debtor this system is ideal. It provides every pretext that ingenuity could conjure up for months of delay and of cost accumulating.

The Small Debt Procedure for sums of less than $100.00 provides some relief, but it, too, is wholly incommensurate.

The Inferior Court should be a Court sitting continuously except during vacation. Chamber Sittings and Motions should be, if not abolished, reduced to a minimum. Judgment by default should be procurable within ten days after service of the Writ or Summons unless a Notice was delivered and filed in the Court within that time, specifying in clear but informal language what Defence there was to the Claim, and verify-

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ing this by the Defendant's Affidavit. Then on that being done the Registrar should have the authority either peremptorily or on the application of either party to fix a date for trial; and that should be not later than one month afterwards. In the interim before the Trial each party should be obliged to serve Notice of the documents he intended to use on the Trial, and inspection of these should be the right of the other party.

The Trial should be one of some reality and not a farce, as so many Inferior Court trials are under the present system. There is not, in many of them, even the pretence of deciding according to law. In fact, some of the Judges vaunt their ignorance or obviousness of Law; and if a point is raised it is flouted as a technical device to shun or to enforce an obligation. Hence it is that our Appeal Courts are glutted with pettifogging cases which on the first trial have been half heard and mashed up into a mess of intricacies. But this is another tale.

There should, of course, be a right of Appeal from the Inferior Court Judge, but such Appeal, if it goes to the facts only, should be to a Judge of the Superior Court and be by way of rehearing; and if it concerns a question of law it should be to the Court of Appeal. The Judge of the Inferior Court should be obliged to certify the determining factor of his own decision—whether it was a question of fact or of law; and the appeal should lie accordingly.

The obligation to yield this Certificate would be a corrective of the present happy-go-lucky system of arbitrating, or rather of splitting in twain the bone of contention, regardless of the right of one party or the other.

To give a chance to such a reform it should be made the avowed Policy of the Crown to promote to the Superior Court, Judges of the County and District Courts who had evinced by their judgments the best judicial faculties, just as it should be the policy

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to advance, for similar reasons, the ordinary Supreme Court Judges to the Appeal Court.

The prospect would be a stimulant and an incentive, and it would keep aglow the flame of ambition which under the present system smoulders and decays, leaving the erstwhile enthusiast, and aspirant for eminence, a stagnant and time serving official.

The Bar of Canada has now an Association. The Judges, too, should have an Association from which they could formulate proposals for reforms both of the Law and the procedure. They should not, on ascending the Bench, as many of them do before their fiftieth year, be content to regard themselves from the composed attitude of *Otium cum dignitate*.

This is yet a small Country, though potentially and in destiny it is a Country of great achievements; and our Judges should aim to do something for our Law and jurisprudence just as the Judges of other young and rising Countries have done in the past. Since the dawn of Britain's real greatness after the Revolution, what an array of great Jurists the past two centuries or so have evolved! Canada is more advanced to-day than England was in the days of the Long Parliament of Cromwell; but what has Canada produced in the way of Jurists and Judges compared with England or Scotland or Ireland?

Our Constitution has been worked out and developed largely by interpretations of the Privy Council; and the arguments before that Tribunal have in the main been presented by English Counsel.

The way to correct this is not to abolish the Privy Council but to produce men whose ability, training, and study equip them for the task of comprehending problems fundamentally, and of presenting them from judicial aspects. And when men of this type do appear—men of eminent capacity—we should concede them the due of their merit. We should not scan them, as is now the rule, with envious and jealous eyes, but with that generous approbation which men of culture

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and greatness always can, and do, accord to one another.

There are diversities of talent, and why should Canadian Barristers blink the fact? Why should they not applaud the triumph of a Canadian Barrister, just as they applauded the Canadian Soldier? Conspicuous talent is the feature of admiration in both; but in one case jealousy overmasters generous sentiment and in the other jealousy is entirely absent.

The truly great man is never jealous. He is an admirer of others even in the sphere in which he himself excels or aspires to excel. The mediocrity is the converse of this, and will never admit that he has a superior in his own arena.

B. T.

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DOMINION'S EXEMPTION FROM PROVINCIAL TAXATION OF C. P. R.

By Bram Thompson, M.A., Regina.

The Exemption by Dominion Enactment of the Canadian Pacific Railway from taxation by the Provinces carved out of the North-West Territories — Manitoba, Saskatchewan and Alberta—has often been formulated as a grievance against the Dominion Government; but the legal proposition has never been discussed whether or not the Parliament of Canada could enact such an exemption and impose its obligation not only on the Executive Government of the Provinces, but on the Legislature as a restraint on its taxing authority. As they did with the problem of the Ownership of the Land and Natural Resources, political propagandists have used the exemption grievance for generating election expletives which shot aloft and illumined the sky, and then vanished, leaving nothing but a tinge of yellow behind them.

I was the first man to discuss the Ownership of the Land as a Legal and Constitutional problem entirely apart from and unaffected by politics; and the claim of the Dominion has quite recently received its *quietus* in a momentous endorsement by the Privy Council of the Legal arguments for Provincial Rights presented in the C. L. T. ever since 1919. The words of that endorsement appeared in the April issue.

The validity of the Exemption from taxation is a natural sequel to that problem. As such we propose to discuss it, and with the same assurance of demonstrating the utter untenability of the Dominion's asserted right in this regard, as we had in demonstrating the grotesque absurdity of the claim of the Dominion to be the Owner of the Lands of the West.

The right which Parliament assumed to make the Taxation Exemption is, however, based on an assumption of Ownership by the Dominion over Rupert's

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Land and the N. W. Territory; and therefore, to some extent, I am obliged in discussing the Exemption to explain the true relationship of the Dominion to the West, and of the authority of Parliament over it, though I am anxious to avoid, as far as possible, any restatement of the Land Problem itself.

The Dominion assumed or defiantly asserted from the start, and with augmenting audacity through the years since 1870, that Rupert's Land and the N. W. Territory were on the 15th of July, 1870, ceded or surrendered to it by the Imperial Government. Indeed, it has been, in its clamorous-tongued utterances, so fanatical as to claim that this session was in the nature of a Quit Claim by Great Britain in deference to, or as an acknowledgment of, the precedent right of New France, as it was named by Sovereign occupancy, to all of the West from the Western Boundary of Ontario and Quebec as far as the Rocky Mountains. This right, it was claimed, was unaffected by the Surrender and Treaty of 1763; and after, and notwithstanding, the revolutionary events of that period, the Great West remained a distinct acquisition of, and appendage to, but no integral part of, the new Colony of Canada established by Great Britain in 1763. Nor was this Great West affected, it was averred, by the scheme of Confederation; and after its consummation by the B. N. A. Act, 1867, the vast area passed by a Cession from the Imperial Government to the Dominion in a right and title entirely apart from the B. N. A. Act.

The Dominion, in other words, was in this viewpoint a Sovereign or at least an autocratic Suzerain over the West, though it was itself subservient to the B. N. A. Act, 1867, so far as its original constituents—Upper and Lower Canada, Nova Scotia, and New Brunswick—were concerned. Of course in a claim so preposterous there was no truth; but the fact that there was such a claim serves to account, as nothing else can account, not only for the Exemption from

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Provincial Taxation, which I am now discussing, but for the persistent defiance by the Dominion Government and Parliament of the provisions, not only of the B. N. A. Act, 1867, but of Rupert's Land Act, 1868, and of the Order in Council of 23rd of June, 1870, under which Rupert's Land and the N. W. Territory were, upon the Petition of the Parliament of Canada itself, admitted into the Federal Union as two new Members of it subject to the B. N. A. Act.

If they had been merely admitted there would and could have been no doubt, their position; for as Members of the Union, Rupert's Land and the N. W. Territory had the same rights of Government and Legislation as the other Members; and the United Body or Dominion had no more authority over them than it had over the other Members under the B. N. A. Act, 1867. But these two new Members were admitted prematurely and were virtually two vast areas of unoccupied land. They could not then exercise their own rights of Government and Legislation so indispensable to their development.

The truth is, the Imperial Government had no desire to enter them into the Union at that time. It apprehended their anomalous position, and entertaining towards them the same paternal solicitude as it had ever evinced to its budding Colonies, it would, but for the impetuous urgency of the Dominion, have partially developed them and then given them the rights of self-government, leaving them free to choose whether or not they would enter the Federal Union of Canada.

But the Dominion was insistent and was not to be withstood. So it undertook to assume the functions of Government and legislation for the new Members which they themselves could not *pro tempore* exercise. Parliament accordingly presented an Address to the Imperial Government for the admission to the Union of Rupert's Land and the N. W. Territory, and setting forth the purposes in view, the legislative authority

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required, and ending with the undertaking, I have stated. Here it is:

"That it would promote the prosperity of the Canadian people, and conduce to the advantage of the whole Empire, if the Dominion of Canada, constituted under the B. N. A. Act, 1867, were extended westward to the Pacific Ocean. That the colonization of the fertile lands of the Saskatchewan, the Assiniboine and the Red River Districts; the development of the Mineral Wealth which abounds in the regions of the North-West; and the extension of Commercial intercourse from the Atlantic to the Pacific are alike dependent upon the establishment of a staple Government for the maintenance of Law and Order in the N. W. Territories.

That the welfare of a sparse and widely scattered population of British subjects of European origin already inhabiting these remote and unorganized Territories would be materially enhanced by the formation therein of political institutions bearing analogy as far as circumstances will admit, to those which exist in the several Provinces of this Dominion.

That we do, therefore, humbly pray that your Majesty will be graciously pleased . . . to unite Rupert's Land and the N. W. Territory with this Dominion, and to grant to the Parliament of Canada authority to legislate for their future welfare and good government. And we express to your Majesty that we are willing to assume the duties and obligations of Government and Legislation as regards these Territories."

There is not much assertion here of anterior or precedent Ownership. Nor is there even an adumbration of any intention on the part of the Dominion to become a Suzerain over the West.

The two areas were duly admitted into the Union and made parts of the Dominion subject to the B. N. A. Act, 1867, and upon the terms set out in this Address; and here are the Legislative powers conferred upon the Parliament of Canada to enable it to implement its undertaking;—

1. By Rupert's Land Act, 1868:

(a) Power to make, ordain, and establish within the Land and Territory all such Laws, Institutions and Ordinances and to constitute such Courts and Offices as may be necessary for the peace, order and good Government of Her Majesty's subjects and others therein.

2. By the Order in Council of 23rd June, 1870.

(b) Power and authority to legislate for the future welfare and good Government of the said Territory.

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These powers, be it noted, were not conferred upon Parliament as an addition to the B. N. A. Act, 1867. They were Powers entirely apart and in another relationship; and they were conferred upon Parliament, in fact, in a Legislative Trust Capacity as a substitute Territorial Legislature for the West in accordance with, and in reliance on, its own undertaking to the Imperial Government. As they did not affect or alter the B. N. A. Act, so they could not be used to enhance, or to be blended with, the Legislative powers of Parliament under that Act over every entity or Member of the Union alike.

These new Legislative Powers are very limited indeed. They must be construed as Trust powers and, particularly when they are vague or general, by the purposes for which they were conferred—the terms and conditions stated in the Address, namely, (1) the establishment of a staple Government in aid of (a) colonization of fertile lands, (b) development of mineral Wealth, (c) extension of Commercial intercourse, and (2) the formation of political institutions analogous to those in the several Provinces of Canada.

The new Legislative Powers, in fact and in Law, constituted the Parliament of Canada a *Substitute Territorial Legislature* in a Trust Capacity empowered to make Laws as such and of a limited character for the two new Members: and when legislating for the Dominion as a whole under the B. N. A. Act, Parliament could not use these Powers. If, when so legislating, however, it desired to discriminate and impose upon the West some obligation which it was impotent under the B. N. A. Act to impose on any other entity or part of the Dominion, it had to specifically declare it was using the extra powers it had over the West in a Trust Capacity. The Capacity was anomalous and was essentially and intentionally tentative: and when the specific things set out in Rupert's Land Act were provided, and the Government and Political Institutions mentioned in the Address were established, these

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Legislative Powers ended, and the Legislative Trust Capacity of Parliament over the West ceased. That was not when the Provinces were carved out, but when the N. W. Territories Legislature was first established with an Elective franchise and a Lieutenant-Governor representing the Sovereignty of the King. This, however, I need not here further discuss.

Having explained that the Legislative Powers of Parliament, both under the B. N. A. Act and in its Legislative Trust Capacity as a Substitute Territorial Legislature for the West, were quite distinct and not fusable together, I ask in which capacity Parliament enacted that the Canadian Pacific Railway should be free from Provincial Taxes?

A little history will again help us here.

After getting the West into the Union in 1870 on the terms stated, one of the first things that Parliament did was to enact the Dominion Land Act, 1872. In what capacity has yet to be determined; but it defined Rupert's Land and the N. W. Territory including the lands of Manitoba as the "Public Property of the Dominion," that is, of the other then existent entities; and ever after Parliament in its legislation, arrogantly assuming that it was an absolute Suzerain, if not indeed a complete Sovereign, over the West, has disregarded the limitations and restraints of both its capacities—its capacity under the B. N. A. Act and its Legislative Trust Capacity under Rupert's Land Act, 1868, and the Imperial Order in Council of 23rd June, 1870—and has autocratically made enactments as a Sovereign Owner and a Sovereign Parliament unamenable to any restraint.

Of course this Dominion Land Act so far as it tried to make the West "public property of the Dominion" was an absolute nullity—*nullitas nullitatum*. Such an Act was not only beyond the powers of Parliament—even all the powers combined—but it was repugnant to, and destructive of, the whole scheme of the Federal Union.

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The year before passing this Revolutionary Land Act—1871—British Columbia entered the Union upon certain terms and conditions agreed to by its Legislature and the Parliament of Canada, and among them an undertaking by the Government of the Dominion to commence within two years and complete within ten years, a Railway to connect the seaboard of British Columbia with the Railway system of Canada.

In compliance with this undertaking, the Dominion Government entered upon the construction of the Canadian Pacific Railway under the authority of the Statute 37 Vic. cap. 14 (1874). It did not progress very satisfactorily as a Government enterprise; and in 1880 a Contract was entered into for its construction by the private enterprise of a Company.

The Contract was made between Her Majesty the Queen, acting in respect of the Dominion of Canada, and George Stephens, J. J. Hill and others as Contractors. By this contract, the Government of Canada agreed to grant to the Company (*inter alia*) a subsidy of 25,000,000 acres of land in alternate sections of 640 acres each, extending back 24 miles deep on each side of the Railway from Winnipeg to Jasper House, in *so far as such land should be vested in the Government.* And the Contract contained (*inter alia*) the following clause:

16. "The C. P. R. and all stations and station grounds, work shops, and appurtenances required and used for the construction and working thereof and the capital stock of the Company shall be forever free from Taxation by the Dominion or by any Province hereafter to be established or by any Municipal Corporation therein; and the lands of the Company in the N. W. Territory until they are sold or occupied shall also be free from such taxation for 20 years from the Grant thereof from the Crown."

The value of the historical sketch is now very evident.

This is the Contract of an Autocrat and not the Contract of a Government limited in two capacities as I have set out. It pretends to be a Dominion Contract, and it is ostensibly made in pursuance of a Dominion

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obligation; but whence came the power or authority to implement it either with regard to the Land-Grant or the Exemption from Taxes, except of course such taxes as Parliament might itself impose? As to both it was void so far as the N. W. Territory was concerned. Doubtless Parliament knew this much, at all events, and to validate the transaction or agreement it enacted under its Legislative Powers in the B. N. A. Act, 1867, the Statute 44 Vic. cap. 1.

By section 1 of this Act, Parliament approved and ratified the Contract, and authorized the Government of Canada to perform and carry out its conditions.

By section 2 it directed the issue of Letters Patent incorporating, by the name of the Canadian Pacific Railway Company, the parties to the Contract with the powers, privileges, and franchises set forth in the Schedule to the Act; the contract itself being also set out in an appended Schedule.

Now what effect had this Act upon the N. W. Territories, or upon the validity of the void contract relating to their Lands and Taxing Rights? None whatever.

This Statute, 44 Vic. cap. 1, was simply a Railway Construction Act passed under the B. N. A. Act, 1867, and the B. N. A. Act gave Parliament no authority over the Lands of the West, or over the taxing powers of the entities of the Federal Union.

This Statute was as abortive as the Contract which it pretended to validate, so far as these Lands and Tax Exemptions were concerned. In saying this, I have clearly before me the fact that at the time of the Statute (1881) the N. W. Territories were under the administration of the Dominion. But in a capacity totally apart from and not fusable with the capacity of Parliament under the B. N. A. Act, 1867.

The Contract, I admit, might to a limited extent have been validated by an enactment of Parliament in its legislative Trust Capacity for the West at any time before its cessation. But this was never done.

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The Dominion or Parliament of Canada played the rôle of an autocratic Suzerain and, disregarding its constitutional position and limitations, was content to assume that what it put on a Statute was Law. Its confiscatory Land Act pretending to make the new entities "public property of the Dominion" has been the undoing of itself, through the implicit faith which it reposed in that piece of dead-born legislation; and through its legislating and making Letters Patent Grants of land ever afterwards on the basis of the existing vitality and validity of this dead-born legislation.

Had then Parliament when exercising its legislative function under the B. N. A. Act, 1871, in establishing the Provinces of Saskatchewan and Alberta, the power or right to impose *proprio vigore* the obligations of this *ultra vires* Contract or Exemption upon them? Assuredly not. But it attempted to do so by section 23 of the Alberta Act, and section 24 of the Satskatchewan Act, 3 Edw. VII. cap. 42 and 42, in the following words:—

> **The powers hereby granted to the said Province shall be exercised subject to the Provisions of section 16 of the Contract set forth in the Schedule of Chapter 1 of the Statute of 1881, being an Act respecting the Canadian Pacific Railway.**

Here the idea of the Dominion's Ownership of the West is reflected as rank as ever.

The Provinces of Alberta and Saskatchewan are not subordinate, and do not derive their legislative powers from any "grant" from the Parliament of Canada; for the area out of which they were carved, being already subject to the B. N. A. Act, 1867, on their delimitation into Provinces, they had inherently and *ipso facto* the full legislative powers set out in section 92 B. N. A. Act, 1867; and Parliament in its legislative capacity under the B. N. A. Acts could not deplete these powers; nor could it, even if it had been so acting, have alienated, by anticipatory legislation in its Legislative Trust Capacity, the revenue-rights of the Provinces, or have impaired, by the exercise of

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any of its Legislative faculties whatever, the authority of the Provincial Legislatures when once established to raise revenue for Provincial purposes.

Parliament could not, any more than could an individual, make an illegal contract and, by a malign use or abuse of some power that it possessed, impose *proprio vigore* that illegal contract upon a party helpless to resist the imposition. This is precisely what it attempted to do with the N. W. Territories. This argument is intensified by the fact that Parliament was in a Trust relationship to the N. W. Territory. While it maintained a subordinate Legislature in the N. W. Territory, it was autocratically able to impose this illegal Exemption; but when it came to establish Provinces, it could not place the yoke of an unauthorized Exemption from taxes around the necks of Saskatchewan and Alberta, even though the Exemption was ratified by a Statute made under the Legislative powers of Parliament contained in Section 91, B. N. A. Act, 1867, and even though the yoke was imposed autocratically under the B. N. A. Act, 1871.

Parliament could not, either by anticipatory or by subsequent legislation, destroy or impair the Provinces' Taxing authority under Section 92 B. N. A. Act, 1867. At the maximum it was a Trustee and could not alienate, by anticipation, the heritage of its *Cestui que Trust.*

Except as to the Land which the Dominion regarded as its own, the Exemption does not extend to Manitoba. This is significant of conscious impotence.

The only way in which Parliament could have made the Exemption binding on the new Provinces or even upon the N. W. Territories would have been by an enactment, in its Legislative Trust Capacity, before the Provinces were estblishel in 1905, or rather, I prefer to say, before the Legislature of the N. W. Territories was invested with its full taxing capacity in 1891, stating that the Exemption of the property of the C. P. R. Company was for the welfare and good Government of the N. W. Territory. Manifestly such

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an enactment would have been false on its face. It was, happily, never made; and fortunately it cannot now be made.

The power of taxation is a Sovereign right. It was formerly reposed in the Crown; it is now reposed in the People, and has been so without dispute ever since the English Revolution in the Seventeenth Century. It has been so strictly safeguarded for the People that even the British Parliament has not inherently the right to impose a Tax. It must first get its authority from a vote of the People or through their representatives, but not in their capacity as Legislators or Members of Parliament. The votes of Supply and of Ways and Means which annually are passed by the Commons, not when sitting as Legislators but in Committees of deliberation, are the constitutional indispensables of the introduction of any Money Bill founded upon them. If it diverges in the smallest iota from the vote, the House sitting in its Legislative capacity cannot amend it or make it harmonize. It must go back to the Committee and be reconciled there.

Parliament therefore in dealing with statutory taxing Authorities or with their rights, required to be wary of what it was doing. But in 1881 it was obsessed with the conception of the absolute Autocrat; and, without stopping to think of its present act or its future consequences, it placed this Exemption on the Statute Book, believing that there it was invulnerable.

It is beyond dispute that one Taxing Authority cannot by making an exemption from taxes impose it *proprio vigore* upon another Taxing Authority. Even if the Parliament of Canada while legislating under its powers set forth in section 91 B. N. A. Act, legally made, as regards itself, the exemption from taxes of the C. P. R., it could not *mero motu* impose this obligation upon itself in its other Taxing capacity as a Substitute Legislature in a Trust Capacity for the N. W. Territories. Much less could it impose this

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obligation as a matter of internal administration on the N. W. Territories Legislature at any time after 1891, when the Assembly became Elective and its control over Taxation was complete; and much less still could it impose this obligation on two new Provinces without their Legislative consent. We intensify this when we remember the Exemption was *ultra vires* and void *ab initio* as a Contract, and second as an Enactment of Parliament under the B. N. A. Act so far as regards the N. W. Territories.

Parliament never consented to, or ratified this illegal enactment in its other capacity—its Legislative Trust Capacity for the N. W. Territories—and it could not, autocratically, impose this illegal Exemption by its enactment establishing new Provinces under the B. N. A. Act, 1871; for the Exemption, to them, meant that the People of the N. W. Territories and the Legislatures of the new Provinces, had been despoiled not only of their fundamental constitutional Rights, but of their Statutory Rights under section 92 B. N. A. Act, 1867, to impose taxes for raising a Revenue for Provincial Purposes. In other words, if, as a Legislature under the B. N. A. Acts, Parliament could not Exempt the C. P. R. from Provincial or even Territorial Taxation, it could not, while legislating in the same capacity, validate an Exemption so made and impose it as an obligation upon newly created Provinces. Even the Provinces could only adopt or place themselves under the obligation of such an *ultra vires* Exemption by Legislative acts of their own; and then they could not make it endure longer than the duration of any one elected Legislature — four or five years. Each new Legislature would have required to commit itself to the Exemption in order to perpetuate it.

The Exemption so far as concerns the Land does not much affect us now, except that it might have formed the basis of a formidable claim for compensation payable by the Dominion to the Provinces were it not for the yet greater fact which has been demon-

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strated—that the C. P. R. Company never had any valid title to the Lands themselves which at all times since 1870, in spite of the Dominion Land Act, 1872, or of any Grant by Letters Patent, remained first the property of the original entities—Rupert's Land and the N. W. Territory—and afterwards were and now are the property of the Provinces carved out of those entities. They were never granted or alienated by the Crown acting upon the advice of any Government representing either the N. W. Territories or the new Provinces. Nor in pursuance of any Legislative Enactment of any Legislature within the scope of its Authority.

It is a terrible chaos which bull-headed incompetence has produced all through the years. But the Provinces are, now that their eyes have been opened, charged with the obligation of rectifying their own wrong by asserting their lawful claim and title. How an adjustment might be effected between the Provincial and Dominion Governments was pointed out in the June issue of the C. L. T. But whatever is done must have the endorsement of an Enactment of the Imperial Parliament, otherwise for years Titles will be in constant dispute in the Courts and the insecurity of property will repel investment and retard development.

Every Province and every Municipality in the West has the same right of taxing the C. P. R. as have the other Provinces and Municipalities through which the system runs. The Exemption effected under the Contract of 1880, and ratified by the Act of 1881, is and from the beginning was void. *Verbum sapientibus.*

BRAM THOMPSON.

Regina, June, 1922.

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COMPANIES AND DOMINION & PROVINCIAL LAWS.

By H. G. Garrett, Victoria, B.C.

(*Article 3. Concluded from August Number.*)

(10) POWER TO REGULATE.

The powers of regulation have of necessity been alluded to in discussing other heads of this article, but, as the extent to which the Dominion and the Provinces can respectively go in controlling companies is a very contentious issue, a few words may not be amiss.

The much quoted Head 2 of s. 91 has figured in various famous cases, and its meaning is gradually being interpreted in a negative way. It has been definitely construed as augumenting federal authority over its own companies — a sort of bulwark against provincial encroachment. It is clear that the powers it confers must be used in a general manner, and not so as to interfere with matters specifically entrusted to the Provinces. The following passages indicate its scope.

"The collocation of No. 2 with classes of subjects of national and general concern afford an indication that regulations relating to general trade and commerce were in the mind of the legislature."[104]

"Regulation of trade and commerce would include political arrangements in regard to trade requiring the sanction of Parliament, regulations of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion."[105]

But the power "does not comprehend the power to regulate by legislation the contracts of a particular business or trade."[106] That principle is reiterated in

[104] *Citizens Insurance Co., etc., ubi supra*, pp. 112-3.
[105] *Ibid.*
[106] *Re Board of Commerce Act, etc., ubi supra*, p. 201.

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the words "s. 91 (2) does not confer capacity to regulate particular trades and businesses," in the Board of Commerce Act case, where it is suggested as being within the power that Parliament might "call, for example, for statistical and other information valuable for guidance in questions affecting Canada as a whole." Nor does the authority "extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the Provinces."[107] The business of banking is distinguished because it is taken out of provincial jurisdiction by "express words."

The cardinal test would seem to be generality where the Dominion legislates, while in the case of the Provinces particularity and local character, as well as general application, enter into the question. The Provinces, for instance, possess "positive powers of licensing for provincial objects, which are expressly and particularly conferred by s. 92, head 9," and these can be exercised notwithstanding similar legislation by the Dominion. Such powers were conferred "on the provinces by way of exception both from the general power of legislation given to the Dominion by the initial words of s. 91, and from any *purely general* enumerated head, such as the regulation of trade and commerce."[108]

The full significance of the construction placed on s. 91 (2) in the passages cited on p. 27 (*ante*), is a problem to be solved. In what way does s. 91 (2) "aid Dominion powers," so far as they relate to Dominion companies?—It is submitted that at any rate that construction would not enable the Dominion to convert its "general" companies into a quasi-"exclusive" class or to confer any special privileges on them to the prejudice of provincial companies or "properly framed" provincial legislation dealing with civil rights and property, etc.

The Privy Council has intimated some at least of

[107] *Ibid.*, p. 198 and *Insurance Reference Case, ubi supra*, p. 596.
[108] *G. W. Saddlery Case, ubi supra*, p. 118.

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the powers possessed by the Provinces to regulate Dominion and other companies, *qua* companies—

"They may pass laws applying to companies without distinction and requiring those that were not incorporated within the Province to register for certain limited purposes, such as the furnishing of information."

or—

"enact that a company which had not an office or assets within the Province should, under a statute of general application regulating procedure, give security for costs."[109]

Their Lordships have further expressed the opinion that if a Provincial Act—

"merely required a Dominion company within a reasonable time after commencing to carry on business (in the Province) to register its name and other particulars in the provincial register and to pay fees not exceeding those payable by provincial companies and imposed upon it a daily penalty for not complying with this obligation, it could be supported as legitimate machinery for obtaining information and levying a tax."[110]

Then there is the case which decided that s. 69 of the Dominion Companies Act, relating to borrowing powers, was *ultra vires* in so far as it conflicted with Provincial legislation.[111]

In other words, we come back to the position that the Provinces cannot destroy the juristic personality of an extra-provincial company, or deprive it of the general rights enjoyed by residents of the Provinces. That granted, they wield, subject to the express heads of s. 91, plenary powers of regulation over all companies. A Province may in addition to requiring a license to be obtained attach a condition.

"If the condition of taking out a license (as a condition of the exercise of its powers by a Dominion company) had been introduced not so as to affect the status of the Dominion Company, but simply for the purpose of obtaining payment of a direct tax for provincial purposes, or of securing the observance of some restriction as to contracts to be observed by the public generally in the Province, or of causing the doing by that public generally of some act of a purely local character only under license," the condition would have been

[109] *John Deere Plow Case, ubi supra*, p. 343.
[110] *G. W. Saddlery Case, ubi supra*, p. 123.
[111] *Re Dominion Marble Co.*, 35 D. L. R. 63

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"regarded as one which it was within the power of the Province to impose."[112]

But, by way of contrast,—

"If it is the intention and effect of the (Saskatchewan) Companies Act that a Dominion company, when registered in the Province, shall be subject . . . to the general provisions of that Act, the Act would be open to question on that ground (*sc.* as destroying the status and powers conferred by the Dominion."[113]

Whether the company be established by the Province, the Dominion or a foreign Government, if it be within the limits of the Province, the power to regulate it as a person carrying on business is vested in the Province, but not the power to affect its status as a corporation.

(11) POWER TO TAX.

In the *John Deere Plow and Great West Saddlery Cases* a great deal was said in the arguments before the Privy Council about the fees charged to Extra-provincial companies for licenses to do business — the contention being that such fees were not "direct taxation," and, granting that they were, amounted to discrimination in favour of provincial companies. This phase of Provincial jurisdiction was not actually in issue, and is accordingly only touched on generally in the judgments.

The Dominion powers embrace the whole field of taxation, while the Provinces are restricted to direct taxation and revenue derivable from licenses. A Provincial tax to be legitimate must be a direct tax in the "common understanding" of the term, and be "demanded from the very person who it is intended should pay it"—and its "ultimate incidence" and "the time of payment" are tests of its validity.[114] There must be no attempt to "impose indirect taxation under the guise of direct taxation," and such taxation must not be discriminatory—see the passage cited *ante* from

[112] *G. W. Saddlery Case, ubi supra*, p. 120.
[113] *Ibid.*, p. 123.
[114] *Attorney-General for Quebec* v. *Reed*, 10 A. C. 141, 143-4.

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the *Great West Saddlery Case*, where the words "fees not exceeding those payable by provincial companies" are used. As illustrating the scope of direct taxation, it has been held that a tax on gross premiums received by insurance companies is valid when the premiums were (*a*) payable in the Province, (*b*) in fact paid there, (*c*) in respect of a risk taken there, or (*d*) due from a person resident in or on property situate there.[115] Mere variation in the rate of the tax is quite permissible, as for example where it is graduated on the capital employed or the number of branches carried on.[116]

A Province can doubtless enforce payment of its own taxes by a provincial company in any way it pleases, but as against a Dominion Company "the method . . . may be restricted to the bringing of an action with the usual consequences," and "it does not follow that (the Government) can put an end to the existence or even the powers of the company for . . . non-compliance."[117] Where the Company comes from another Province or (perhaps) a foreign country, while the Province cannot put the company out of existence, it probably can enact more stringent sanctions than in the case of a Dominion Company.

The points in the cases challenging provincial legislation were: (1) whether fees payable under a Companies Act were valid direct taxation, and (2) whether such fees, if based on the nominal capital of (say) a Dominion company, could be properly imposed on it, the company having already paid similar fees to the Dominion at the time of its incorporation, and provincial companies being only liable to pay such fees at the time of their incorporation by the Province. As to (1) there can, I submit, be no doubt that the fees constituted a perfectly legitimate tax, although the impost is not so called.

As to (2), there is more room for argument, and

[115] *Treasurer of Ont.* v. *Canada Life Assurance Co.*, 22 D. L. R. 428.
[116] *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575.
[117] *G. W. Saddlery Case, ubi supra*, p. 115.

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those who uphold the rights of Dominion companies will not rest satisfied until they secure a definite ruling. To a Dominion company the fees appear unfair because its charter purports to give it the right to do business anywhere in Canada. A foreign company has no ground for complaint, as it must expect to be charged an "entrance fee" into any other jurisdiction. But the real intention of the tax is that every incorporated company shall contribute to the revenue in consideration of the privilege of carrying on business as a corporation. Is it not in that sense a law of general application and the date and place of creation of the company immaterial?

(12) POWERS AS TO FOREIGN COMPANIES.

The boundaries of the respective jurisdictions of the Dominion and the Provinces over foreign companies require judicial delimitation. The decisions involving the question are by no means adequate, and it would seem that either the Dominion or the Provinces have exceeded their powers in enacting certain statutes which are in force to-day.

The Companies Acts of the Provinces require purely foreign, that is, alien companies to register before they are entitled to do business and deprive them in case of default of those rights which it has been settled cannot be taken away from a Dominion company by such legislation. The Insurance Act, 1917, of the Dominion requires alien insurance companies to be licensed and, when they have complied with the statute, purports to incorporate them as Dominion Companies with similar powers to do business in Canada, and goes on to impose various regulatory conditions as to their contracts, etc. Can a Province stop an alien from entering Canada, even in the absence of federal legislation under the specific head, "naturalization and aliens?" Can Parliament, having permitted an alien to enter Canada, confer rights on it, and regulate its business so as to over-

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ride provincial laws, even when the power "to regulate trade and commerce" is also invoked?

It has indeed been held that—

"The Dominion Parliament has jurisdiction to require a foreign company to take out a license from the Dominion Minister," but the legislation must be "*properly framed*," and such a power is given by the heads in s. 91, which refer to the regulation of trade and commerce and to aliens."[118]

And also that "every alien when naturalized in Canada becomes *ipso facto* a Canadian subject of the King." Perhaps therefore it may be said that an Insurance Act merely imposing the necessity of a license—just as an individual must possess a certain sum of money—and merely conferring a general right to do business in the Dominion—since a Canadian subject, who is a natural person, has the right to move freely from one Province to another—would be valid. But surely the Act cannot interfere with the status and capacity of a foreign corporation and destroy its identity by a process of conversion into a Canadian company, or, on the other hand, give an alien—as it happens, a corporation — superior rights to those possessed by a natural subject of the King, who, if resident within the jurisdiction, must at all times obey Provincial laws?

In the *Union Colliery Case* it is said that there is—

"No reason to doubt that by virtue of s. 91, s.-s. 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges and disabilities of the class of Chinamen who are resident in the Provinces of Canada."[119]

This language, however, was somewhat widely phrased and accordingly we find its effect toned down.

"The regulations there (*sc. Union Colliery Case*) impeached were . . . in truth devised to deprive the Chinese . . . of the ordinary rights of the inhabitants of British Columbia, and in effect to prohibit their continued residence in that Province, since it prohibited their earning their living in that Province."[120]

[118] *Insurance Reference Case, ubi supra*, p. 587. See *Farmers' Mutual Insurance Co.*, 370 D. L. R. 705.

[119] Page 587, *cp. Re Japanese Treaty Act*, 56 D. L. R. 69.

[120] *Cunningham* v. *Tomaj Homa*, 1903, A. C., p. 157.

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Lord Halsbury also sheds light on the extent of jurisdiction possessed by the Dominion.

"If the mere mention of alienage in an enactment (*sc.* by a Province dealing with the franchise) could make the law *ultra vires*, such a construction of s. 91, s.-s. 25, would involve that absurdity. The truth is that the language of that section does not purport to deal with the *consequences* of either alienage or naturalization. . . . It is for the Dominion to determine what shall constitute the one or the other, but the question as to what consequences shall follow from either is not touched. The right of protection and the obligation of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality."[m]

In other words, the deduction is that the Dominion alone can lay down the circumstances and conditions under which aliens shall be allowed to enter, and further, can bestow or impose rights and duties on them only *qua* citizens of Canada, not *qua* residents of a Province. Is that not the limit of its jurisdiction? Beyond that limit, does not control pass to the Provinces? *The Union Colliery Case* seems to go altogether too far, when its language is compared with that used in the later case. The Naturalization Act, 1914, grants to a naturalized alien only the same rights to acquire and hold real and personal property as are enjoyed by a natural-born British subject—that is, a definite right is conferred on him which the Provinces cannot take away. But there is nothing, it is submitted, in the B. N. A. Act which prevents a Province from conferring on or withholding from an alien not naturalized such rights in respect of property as it pleases, until Parliament intervenes. There being no general Dominion legislation dealing with alien companies, the Provinces can, subject to such special Acts as are in force and in so far as they are valid, exercise the jurisdiction.

(13) ACQUIESCENCE IN THE JURISDICTION.

In one of the numerous cases in which the notorious Dominion Trust Co. has figured, the Ontario statute

[m] *Ibid.*, pp. 156-7.

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relating to trust companies was challenged, and the right of the Province to hold securities in its possession contested.[122] It was held that as the Company had voluntarily applied for and obtained registration, it had waived any objections it could have urged against the validity of the legislation. The decision appeals to me as reasonable, and the principle is applicable to all Dominion legislation, such as the Insurance Act, 1917, or Provincial laws, requiring extra-provincial companies to become licensed or registered.

Although this paper has taken up so many pages that the learned editor of the magazine will, I fear, be almost entitled to complain, I feel that but scant justice has been done to the subject. If I have given a bird's-eye view of the problems to be settled and the passages selected illustrate their various aspects, that will perhaps serve at least to provoke investigation. Let me attempt a brief summary.

Here we have a condition of things pregnant with continuous conflict and full of uncertainty. It has been shown that there are—

(1) Different authorities for incorporation — the Dominion and the Provinces;
(2) Different powers to incorporate — exclusive, general and geographically limited;
(3) Different methods of incorporation—the special Act, letters patent and the memorandum system;
(4) Different effects flowing from incorporation—Dominion capacity, Provincial capacity, natural person and *ultra vires* capacities;
(5) Different systems of general company law—

and Sales of Shares Acts and what-not in addition. As a result injustice is done to Dominion companies in their being called on to comply with so many Provincial laws—injustice is done to Provincial companies, as witness the *Compagnie Hydraulique Case* — injustice

[122] *Attorney-General for Ontario* v. *Railway Passengers Assurance Co.*, 43 D. L. R. 344.

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is done to the Provinces through the incorporation of bogus Dominion companies. The position as a whole is harassing and perplexing to business men, lawyers, investors, creditors and foreigners — increases the expense of doing business—retards the development and despatch of business—is a source of friction and litigation and invites fraud. Against that account there can be set hardly one iota of advantage. It is not an edifying picture, and in a country like Canada which becomes more closely knitted together each year as a single commercial entity, there is here a golden chance for statesmanship, if compromise be truly of its essence. What the British North America Act says, or has been construed to say, matters not. It has been amended before and can be amended again. The spirit of its design is palpable—its history is blemished. It should at least secure an honest patriotic use of the powers distributed, free movement all over the country and respect for vested rights.

We want a single system of company law which is in harmony with the modern systems found elsewhere in commercial countries — which though uniform in character is not centralized, but is subject to local control—and which is elastic enough not to interfere with or hamper companies domiciled outside the area of local control. Is it not feasible—

(1) To have a single Act, like the United Kingdom, with its local jurisdictions of England, Scotland and Ireland;
(2) That the Act should be of the "memorandum" type, which is in one form or another the type that prevails everywhere;
(3) That there should be registration in every jurisdiction where there is "residence," the right to registration being acknowledged, except in the case of such legislation as Prohibition Acts;
(4) That powers should be everywhere controlled by the principle of the *ultra vires* doctrine—modified, if thought fit;

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(5) That fees should be moderate and uniform and regulations, disclosure, returns, and general company law identical, except in genuine special cases;

(6) That the Dominion "exclusive" powers should continue and Provincial "exclusive" powers be admitted — the sham Dominion company would be a thing of the past;

(7) That foreign companies be registered only in the Provinces where they carry on business; and

(8) That classes of business which assume national dimensions and importance, such as the grain trade and insurance, be allowed as proper subjects for federal supervision and legislation— this suggestion, however, with considerable reservation.

H. G. GARRETT.

Victoria, July, 1922.

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NOTES ON IMPERIAL CONSTITUTIONAL LAW.

By Professor Berriedale Keith.*

Ireland as a Dominion.

Constitutionally the most interesting aspect of the Irish settlement is the fact that the Irish Free State owes its existence as a Dominion to a formal treaty[1] between duly authorized representatives of His Majesty's Government and plenipotentiaries representing Sinn Fein. There is, of course, no parallel for such a position in the earlier history of the Empire. The arrangement at Vereeniging of May 31, 1092, when the burghers laid down their arms on terms, was admittedly not a treaty, and His Majesty's Government pointedly refrained from calling it by that name.[2] Nor, of course, did it concede responsible government, and the actual concession of that form of government was made, as in the case of the other dominions, at a time when the legal and constitutional supremacy of the United Kingdom was unquestioned. The closest parallel to one side of the transaction is the treaty of peace with the revolting American colonies in 1783, for by it the Imperial Crown conceded the national status and sovereignty of these States, which it had hitherto denied, and similarly the treaty of December 6, 1921, constitutes a recognition of Irish sovereignty. Fortunately, however, there is the vital distinction that the State thus recognized has agreed to accept Dominion status in lieu of claiming independence.

Divergences from Dominion Status.

At the same time the circumstances and the mode of the coming into being of the new Dominion have

* Note:—This Article on a highly important branch of Constitutional Law is, by permission, reproduced from the Journal of Comparative Legislation and International Law.—B.T.

[1] Parl. Paper, Cmd. 1560.

[2] Parl. Paper Cd. 1096.

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resulted in distinct derogations from Dominion precedents. In the case of the Dominions, the maintenance there of Imperial military and naval forces after the grant of responsible government was regarded as at once right and desirable, and the gradual process of the withdrawal of these forces has been a matter of friendly arrangement dictated by the very proper desire of the Imperial Government to reduce its liabilities and of the Dominion Governments to accept a fair share of the burden of defence. The Irish Treaty, on the other hand, contains provisions (Article vi-viii) to secure Great Britain against possible hostility on the part of the Irish Free State. A further derogation is the provision (Article v) that the Free State shall assume liability for the public debt of the United Kingdom and for war pensions in a proportion to be fixed by arbitration in default of agreement; but the effect of this clause is indefinitely limited by the right to adduce counterclaims which is conceded. More important probably is the prohibition (Article xvi) against the endowment of any religion or any educational or other discrimination on religious grounds; but this restriction is made applicable also to Northern Ireland, and there is thus a very definite *quid pro quo* to explain the acceptance of the clause. The compact is silent as to fiscal matters, thus leaving it to the Free State to decide at her discretion what *regime* will be extended to other parts of the Empire, and the adoption of a new form of oath (Article iv) emphasizes that the fidelity and allegiance of the members of the Parliament of the Free State are primarily to the constitution of the State, and only secondarily to the Crown.

Comparison with Canada.

While Canada has been chosen as the exemplar of Dominion status by which the rights of the Free State are to be measured, it is obvious that the parallel is defective. An essential feature of the Canadian constitution is the fact that, save in minor details, not

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affecting essentials, it can only be changed by the action of the Imperial Parliament, and it would, of course, be absurd to expect such a condition to apply to the Free State. The Free State, on the other hand, is clearly entitled to ask for the same concession as to diplomatic representation which was made to Canada, though fortunately it has not yet been acted upon, and her admission as a member of the League of Nations will accentuate the necessity of some attempt to reduce to a coherent system the present state of affairs regarding the foreign relations of the British Empire. A further point of difficulty is presented by the Canadian request for the removal of territorial restrictions on her power of legislation which naturally is equally necessary for the new Dominion.

Constitutional Appeals.

If the Canadian model is strictly followed, appeals will lie by leave of the Judicial Committee from the Irish Courts. But it may safely be anticipated that no such state of affairs would be acceptable to the Free State, and that Irish causes will normally be disposed of finally in Ireland. But obviously there will be need for some means of dealing with questions which must arise as to alleged violation of the terms of the treaty; for example, regarding the endowment of religion or religious disabilities imposed by Irish legislation, as well as with more political issues, such as disputes as to the observance of the military and naval clauses of the treaty. The most satisfactory solution of such difficulties would seem to lie in the establishment of the principle of referring every sort of dispute to the arbitration of a body including representatives of both sides and of the other Dominions. The adoption of some such system will in all likelihood become more and more desirable in respect of divergences of view between the Imperial and the Dominion Governments themselves;[8] but in the case of Ireland there are obviously much more immediate

[8] Keith, War Government of the Dominions, pp. 260, 261.

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prospects of differences of opinion which cannot well be settled without the intervention of some form of tribunal whose decisions would be respected by either side. In questions of a mainly legal type, the Judicial Committee could provide both British and Dominion arbitrators of the highest judicial status.

The Privy Council and the Canadian Provinces.

The value of the appeal to the Judicial Committee to the Provinces of the Dominion, and the grounds of the objection to the abolition of that appeal entertained by the majority of Canadian lawyers,[4] despite certain notable exceptions, are strikingly exemplified in the decision of the Committee in *Canadian Pacific Wine Co. Ltd.* v. *Tuley and others.*[5] This appeal was brought from the Court of Appeal of British Columbia and asked for an order for the return of movable property of the appellants, including books and a store of liquor alleged to have been wrongfully seized, and for redress in respect of wrongful entry by police officers of the City of Vancouver into the appellants' warehouse. The action taken by the police arose out of the Provincial Prohibition Act, and the essential point in the appeal was the contention that the Summary Convictions Act of the Provinces, under which it was sought to justify the proceedings of the police, was *ultra vires.* That enactment provides that, where a penalty or imprisonment is prescribed by any statute of the Province and no provision is made as to the manner of enforcement, such penalty or imprisonment shall be enforced on summary conviction before a justice, as if this were expressly so enacted in the statute imposing the sanction. This enactment was, it was contended by the appellants, *ultra vires,* since the Dominion Parliament had exclusive power, under the British North America Act, 1867, s. 91 (27), to legislate as to criminal law, including procedure in criminal matters. The issue was obviously a

[4] See this Journal, vol. iii., pp. 184-189.
[5] (1921) 37 T. L. R. 944.

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vital one, from the point of view of provincial autonomy, since an adverse decision would have struck at the whole basis of provincial power to deal with the liquor traffic in any effective manner. The Judicial Committee found no difficulty in upholding the validity both of the Prohibition Act itself and of the Summary Convictions Act. In the case of the former statute, they held that it fell precisely within the principle of *Attorney-General for Manitoba* v. *Manitoba License Holders' Association*,[6] and indeed the conclusion was inevitable. As regards the latter Act, they drew a clear distinction between the Dominion power to legislate for the peace, order and good government of Canada generally and for criminal procedure in connection therewith, and the exercise of provincial authority in the case of the Summary Convictions Act. This they justified under the exclusive powers of the Province under s. 92 of the Act of 1867 to deal with "(14) the administration of justice in the Province, including the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in these courts; (15) the imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section," and "(16) generally all matters of a merely local or private nature in the Province." The decision with its solution of the doubts which have been often expressed regarding the quasi-criminal legislation of the Provinces, has not gone without criticism in the Dominion, but it is manifestly fully in accord with the decision in *Attorney-General for Ontario* v. *Attorney-General for the Dominion*,[7] and with the whole spirit of the British North America Act.

The High Court of Australia and the States.

While the Canadian Provinces have found a supporter of their privileges in the Privy Council, the

[6] (1902) A. C. 73.
[7] (1886) A. C. 348.

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Australian States have both during[8] and since the war found that the tendency of the High Court is to lean towards a generous extension of the powers of the Commonwealth to the diminution of the authority of the States. The degree to which this tendency has been carried is strikingly exemplified in the case of the *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. and others*,[9] in which it was held by a majority of the High Court that the awards of the Commonwealth Court of Arbitration are binding on the States in their dealings with their employees. The objections to such a situation are obvious enough, and it is not surprising that the decision has not been popular with the States as a whole. But there is a special reason for the dissatisfaction felt at the decision in that it reversed deliberately the contrary ruling laid down in 1906 in the case of the *Federated Amalgamated Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employees' Association*,[10] when the High Court applying to the States the principle asserted for the benefit of the Commonwealth in *D'Emden* v. *Pedder*,[11] held that the Commonwealth could not, save where expressly authorized by the Constitution, give to its agencies an operation which, if valid, would fetter, control or interfere with the free exercise of the legislative or executive power of the States. The principle of the immunity of State instrumentalities thus asserted had until 1920 been regarded as beyond question,[12] and the alteration of view is explained simply by the change of personnel in the High Court, the members of which, of course, are appointed by the Commonwealth Government, and accordingly cannot be expected to be strong supporters of State rights. The variation of view is clearly contrary to the principles regarding the following of

[8] Keith, War Government of the Dominions, p. 306.
[9] (1920) 28 C. L. R. 129.
[10] (1906) 4 C. L. R. 488.
[11] (1904) 1 C. L. R. 91.
[12] *Australian Workers' Union* v. *Adelaide Milling Co., Ltd.* (1919), 26 C. L. R. 465.

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earlier decision expounded by the House of Lords in *Bourne* v. *Keane*,[13] but the High Court has, in doing so, exercised a privilege which is not enjoyed by the English Court of Appeal or the House of Lords, but is claimed by the Judicial Committee.[14]

The High Court and the Privy Council.

It is not surprising that it should have been felt in the Commonwealth that the case was precisely one in which the High Court should be asked to grant the necessary certificate permitting an appeal to the Judicial Committee. By the conjoint effect of the Constitution (s. 74) and of Commonwealth legislation reserving constitutional cases to the High Court,[15] that Court has the unfettered power of making its own decisions final by refusing a certificate, and this power was duly exercised[16] again by a majority decision, Gavan Duffy and Powers, JJ., dissenting. The refusal can, of course, be explained only on the theory that constitutional cases should be settled in Australia, for obviously on the merits no stronger case for the grant of a certificate can be imagined than a majority decision reversing an earlier decision which had stood for fourteen years without question as part of the law of the Commonwealth. An ingenious suggestion, however, has been made by Mr. Arthur Robinson, Attorney-General and Solicitor-General of Victoria, in his Presidential Address to the Law Institute of Victoria on November 25th last. The Judicial Committee, he points out, is the final authority as to whether any case does fall within the class of causes on which, under s. 74 of the Constitution, the High Court may constitute itself the final court. Such cases are those of the limits *inter se* of the States *inter se*, while the true point for decision in the *Engineers' Case*[17] is whether

[13] (1919) A. C. 815, 874, *per* Lord Buckmaster.

[14] See *Levy* v. *London County Council* (1895), 2 Q. B. 577, 581: *Beamish* v. *Beamish* (1861), H. L. C. 274; *Cushing* v. *Dupuy*, 5 App. Cas. 409.

[15] See Journ. Soc. Comp. Leg. Vol. ix., pp. 269-80.

[16] (1921) 29 C. L. R. 406.

[17] 28 C. L. R. 129.

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the State is a *persona*, bound to obey the commands of the Commonwealth. From this point of view there is of course no true conflict of powers, but the case permits also of the interpretation adopted by the High Court under which the point at issue is whether the employees of the State are solely under its legislative authority, or whether they fall under the authority of the Commonwealth in connection with its power[18] to legislate regarding conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limit of any one State. It is, therefore, unlikely that the Judicial Committee would consent to grant leave to appeal, especially as it has shown every disposition to respect whole-heartedly the authority of the High Court within its own sphere.[19] The only solution of the position from the point of view of the upholders of State rights is that suggested by Mr. Robinson, the modification of s. 74 at the revision of the Constitution which is now planned. But it would be idle to ignore the difficulties in the way of any such alteration, to which strenuous objections would certainly be raised by the Labour Party and by many supporters of the present Commonwealth Government. But the position indicates the very distinct disadvantages of the illogical compromise on the issue of appeals which was adopted by His Majesty's Government in 1900, acting on anticipations of the trend of events which have been entirely falsified in experience.

[18] Constitution, s. 51 (xxxv.)

[19] See especially *Attorney-General for New South Wales* v. *Collector of Customs*, (1909).

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DEFINITION AND SOURCES OF INTERNATIONAL LAW WITH RELATION TO PRIVATE RIGHT.

By Joseph Whitla Stinson, Counsellor-at-Law.*

International law has an ever more important relation to municipal law in the United States, to the civil rights of citizens of the United States, to the common law and the statutory constitutional jurisprudence of our nation. Its definition and sources are of primary importance to the practising attorney in cases which either directly or collaterally present issues of private right under the diplomatic practice or foreign policy of the nation. These may be of rare occurrence, but again, where they do arise, may be of momentous consequence and call for the most careful differentiation, the most discriminating analysis and research. The practising attorney must not be a stranger to the understandings of international law and its sources. He must be able to discern the issue, the element which removes the question from the domain of ordinary municipal law and refers it to the approval law of nations or to usages, treaties and doctrine which constitute modern international law. He must know where and how to seek authority and precedent and bring to bear upon the facts the principle and rule which will be determinative of the right and remedy involved. His problem is to disentangle the accepted legal sanctions of international law from its theoretical aspects, to differentiate that which is purely political from that which, as part of the law of the land under the Federal Constitution, touches and affects private right and is remediable through the process of the courts or the diplomatic intervention of the executive branch of the Government.

* Editor's Note.—This valuable contribution which we have the Author's permission to publish though it is Copyrighted, applies, *mutatis mutandis*, to the Dominion of Canada which is eagerly setting its sails for the Port of Nationhood where Inter-National Law will be the currents blowing around it, sometimes zephyr-like and more frequently tornado-like.—B. T.

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It must be remembered that not in all cases has international law in the modern sense obtained the force of law under the Constitution. Many of its sanctions have still only a certain moral obligation. Here again the practising attorney must be able to discriminate. We are living in an hour when herculean efforts are being put forth to bring the great national states of the world into accord as to the obligatory rules of international law; indeed, under one law of nations which, so far as America is concerned, shall be consistent with the fundamental principles upon which our Constitution is premised and with our Republican form of government. The ultimate conquest of that "new order" in international law will sweep away many usages, sanctions and practices which have heretofore presented grave inconsistencies, foremost of which are limitations upon the rights of belligerency. These discrepancies constitute the reason why a certain popular discredit has attached to the subject of international law. People say that there is no longer any such thing, but while the rules of modern warfare appear to have been differenty understood, and more honoured in the breach than in the observance, there exists to-day a large body of public law, recognized by this Government, controlling in respect to its foreign relations and which is in every sense part of the supreme law of the land. Much of this law finds *paramount* obligation in the universal usage and consent of nations, implied or expressed. In the main, citizens of the United States have clearly defined rights which the Government is bound to protect or assert. Many of these flow from fundamental securities; others from principles of public law and of the usages of modern nations, declared or approved, not created by the Constitution, or extended by compact with foreign nations. Again, by the Constitution, the laws and treaties of the United States, foreign nations, their people, collectively as states, and individually, are under legal and equitable obligation to safeguard

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these rights or indemnify their infraction. At the root and foundation of the American system of international law is the deep, fertile soil of philosophic thought, of principles of natural law and of historical deduction which revivify constantly this tree "whose leaves are for the healing of the nations." Calhoun, in the Senate debate, June 11, 1841, in the famous *McLeod Case,* declared: "The laws of nations are but the laws of morals as applicable to individuals, so far modified and no further, as reason may be necessary in their application to nations."

Definition of international law is, however, a difficult task. The conception of what constitutes the nature, the sanction and the obligation of international law, has varied greatly from periods of the remotest history. In its public aspects and in the modern application of the term, it signifies that "body of generally accepted principles governing relations between states" (G. G. Wilson, "Handbook of International Law"). The definitions to be found in the writings of authorities, modern and ancient, differ widely. These definitions refer themselves to the peculiar leanings of publicists, either to principles of the law of nature or to rules derived from the positive law existant between nations. That which concerns present-day practice is the analysis of the elements of these definitions, rather than their phraseology. It is the law, "as understood among civilized nations" (Wheaton "International Law Digest," 23) regulating the intercourse of states (1 Halleck, "International Law"). It is the definition and modification of that which consists with "those rules of conduct which reason deduces as consonant with justice, from the nature of society existing among independent nations" (Wheaton, *supra*). Professor John Bassett Moore holds: "it is . . . apparent that, from the beginning, the science in question denoted something more than the positive legislation of independent states, and the term "international law" . . . serves to emphasize this fact. *It denotes a body of*

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obligations which is, in a sense, independent and superior to such legislation'' (Moore—International Law Digest, Vol. 1, p. 2). Another great authority defines international law as "the aggregate of rules acknowledged by Christian nations, as obligatory between themselves, and to each other's subjects, including treaties having a municipal as well as an international obligation; rules of action for states as well as individuals in respect to international rights, duties, etc." (Woolsey, International Law, 6th Ed. 4). This is a definition certainly in consonance with Anglo-American jurisprudence. Bluntschli ("Droit International," Art. 1) states very clearly the purpose of international law; "the uniting of different states into a juridical and humanitarian association," and the assuring of citizens of the different states "common protection in the enjoyment of the general rights pertaining to them as human beings."

In the absence of treaty, controlling executive or legislative act or judicial decision, American courts of justice of competent jurisdiction must resort, where questions of right depending upon international law are duly before them, "to the works of jurists and commentators." (*Hilton* v. *Guyot,* 159 U. S. 113), for trustworthy evidence of what the rule of international law really is. This principle is reflected in a declaration of Chancellor Kent; "*In the absence of higher and more authoritative sanctions,* the ordinances of foreign states, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favour of the solidarity of their maxims, and no civilized nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law" (1 Kent's Commentaries, 18; "The Paquete Habana," 1900, 175 U.S. 700 —unfortunately this sense is by no means uniform).

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It is of primary importance to recognize that which is of "higher and more authoritative sanctions" than the writings of authorities upon international law. The Supreme Court of the United States early declared itself upon this subject; "The law of nations may be considered as of three kinds, to wit, general, conventional, or customary. The first is universal or established by the general consent of mankind, *and binds all nations.* The second is founded on express consent, and is not universal, and only binds those nations that have assented to it. The third is founded on tacit consent; and is only obligatory upon those nations who have adopted it." (Chase in *Ware* v. *Hylan,* 1796, 3 Dallas 199). It is observable that in the generally obligatory law of nations, first referred to, there are premises necessarily theoretical and referrable to principles of the laws of nature. Its universality and consonance with the great principles upon which is founded the American Republic gives it paramount authority and obligation in the purview of American jurisprudence. The second division of the law of nations rests upon treaty or other international compact. The third must be evidenced in legislative or executive act or in judicial opinion of the highest authority to be binding. This is mentioned to emphasize the strict legal obligation, under the Constitution of the United States of definitely approved and time-honoured rules, denominated the *law of nations,* and which must be differentiated from that greater body of rules whose sanction rests in the conscience of governments and peoples, and whose totality is summed up in the more modern expression, "international law." This latter division of international law, in the opinion of many of the greatest living authorities, appears to be confused with that law which the American nation upon its establishment became responsible to other members of the general society of nations to observe and enforce, which is obligatory alike upon the government and the citizens of the United States, and for whose defence the most

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urgent need existed at the time of the framing of the Constitution, whereupon the foreign relations of the newly-established American government were to be securely founded. It is this part of modern international law which peculiarly concerns the practitioner, that which has lawful obligation under the Constitution, laws and treaties of the United States, as distinguished from principles whose sanction rests only in a certain moral responsibility in rules and political authorities. It is believed that under the American system the constraint and obligation of international law upon the constituted authorities of government is, under the Constitution, to be referred to necessary limitations upon expressly granted or implied powers. Improvement may be necessary in respect to the definition and administration of international law in the United States, but until democratic ideals and principles have taken a more sure hold upon foreign powers, and their administrative and political authorities are constitutionally limited to observance of the just and equitable principles of the "laws of nature and nations," permanence in international right and obligation cannot be achieved, or the "new order" be established over the present political chaos of nations.

The sources of international law are profound. The habit of the common lawyer, confronted with a new and perhaps a very intricate question of international law, is to think he will find its solution in some well-known compilation of international law, documentary in character, illustrating, for example, the diplomatic practice of the American government, or encyclopedic and a maze of conflicting authority, and to end by resting his case upon some obscure precedent. As said by Professor Moore, "though in many subjects the rules of international law are clear and precise, yet . . . the rule applicable to a particular case may be uncertain and difficult of ascertainment. In such cases an appeal is made to the authority of writers; to the provisions of treaties disclosing a consensus of opinion; to the laws and decrees

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of individual states regulating international conduct; to the decisions of international tribunals, such as boards of arbitration; and to the judgments of prize courts; and of ordinary municipal courts, purporting to be declaratory of the law of nations." (Moore, *supra*). It must be borne in mind that international law is in process of growth; that the case may turn upon some newly crystallized opinion, whose merit and equity is such as to command recognition by the interested government or its courts. Old ideas of international responsibility, of right and wrong, are fading. The modern writers of continental Europe and even the young jurists of the Far East are giving birth to new conceptions of fundamental justice, between nation and nation, nation and alien. New principles of social obligation are slowly but surely metamorphosing the legal relations of nations. Nowhere is this trend more evident, more interesting or more productive of a wealth of advanced ideas than in France. Contra to these influences at work in international jurisprudence are the strong tides of selfish national, political and economic ambition, often drawing to them the most brilliant of brilliant minds, to promote doctrines repugnant to the former more helpful, humanitarian principles, if not to the very institutions of our Republican form of government with its great democratic ideals. These modern foreign works are a vast, unknown continent to the American lawyer, except in rare instances; their exploration must at least broaden his international outlook. Yet they have a greater importance. They may indicate change in the public law of European nations, since foreign tribunals tend to follow the great authorities in jurisprudence, and this change may take away grounds for immunities consistent with the law of nations recognized in American law, may make the exercise of the comity of the nation, or the reciprocity of its courts and diplomatic agencies longer unnecessary. Thus, it may be by treaty, by legislative act or judicial decision that the law of nations as adminis-

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tered in American courts may respond to the advance represented in foreign jurisprudence (case-law) and doctrine. The practising attorney should be able to sense the pulse of foreign juristic thought, to be able to promote, in his arguments, the advance of new principles of international law in the United States.

In cases involving rights arising under treaties of the United States, one must be familiar with the political and economic theories which have influenced or determined their formation. It may not be sufficient to deal alone with specific treaties, but consideration may be demanded of those acts of Congress which have given them executed obligation or abrogated them. The question in issue may resolve merely to one whether a right has survived which is remediable under the Constitution and Laws of the United States. The inquiry may be as to the responsibility of a foreign sovereign; when it may be directly vindicated in the courts of such foreign nation, or become, under the law of the United States, a national reclamation against the offending government. It may, on the other hand, crystallize into a right or a claim against the government of the United States. These are devious paths for the busy, practical lawyer, but the must exactly appreciate his means of recourse, and hence one of the crying needs for a clearer understanding of the principles and rules of international law as applied in American practice.

In dealing with treaty-rights, too much emphasis cannot be laid upon the necessity of grasping the details of their negotiation, the influences which have dominated their initiation and conclusion, the diplomatic correspondence of governments, the debates of co-ordinate legislative bodies. Often the private correspondence of the negotiators supplies cogent evidence of the purpose of clauses, stipulations and terms whose meaning may be obscure. A New York decision gives the common law rule of construction: "Transactions depending upon the rules of international law are to be decided in accordance with those

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rules as they existed at the time when the transaction took place." (*Mortimer* v. *N. Y. Elevated Ry. Co.*, 1889, 6 N. Y. Supp. 898). In the formation of the early American treaties, many of which survive in principle to this day, if not as positive law, the personal views of those who negotiated them and their framers are of the utmost importance. A personal acquaintance with the writings and the thought of the great secretaries of State, of the plenipotentiaries of the United States and of the "inspired fathers" must be gained. When one recognizes in the terms of these earlier treaties the phraseology of the great Continental publicists of the eighteenth century, DeMably, Lampredi, Azuni, Galiani and others, one has the key to contemporaneous definition. One perceives that the doctrines of these writers were leading to great and newly thought-out principles of neutral right and international duty; that they were advancing novel principles of the freedom of commerce and navigation, which found a ready champion in the sturdy young American nation, and were destined to become formulæ later in subsequent great European pacts. The writings of John Adams, of Hamilton, Jay, Madison, Gallatin, the decisions of Marshall, Story and others whose names are consonant with all that is masterful in America's foreign relations, show them to have been conversant with the great publicists not only of their day, but to have been familiar with the portentous works of Vattel, Puffendorf and Grotius, the fathers of modern international law. Even then we have not sounded the depth of our subject. It is true that we see the modern doctrines of neutrality arising after Grotius and many innovations in the laws of war; but they have gone down in the great maelstrom of modern warfare, and hope of their reinstitution is slender. We must seek further for the fundamental grounds of international law, and turn back the pages of history. The great treaties succeeding that of Westphalia, in 1648, serve as luminaries, succeeding the dark ages. The Canonists and the

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Casuisits had spanned mediævalism with principles of Roman law and of Greek philosophy. The student turns to Justinian and the "*jus gentium,*" the law of all the peoples. The praetorian edict in Rome expanded the strict municipal law of the Roman city, upon equitable principles, in favour of the rights of foreigners, the "*peregrini.*" The praetor borrowed liberally from Grecian logic and ethics; he met the demands of the "*jus gentium,*" and the equitable principles of Roman civil law in the early imperial period became the law of the Roman world.

The expression "law of nations," or "*droit des gens,*" is derived from the term "*jus gentium.*" The expression "international law" properly denotes a wholly variant conception (G. E. Sherman, "*Jus Gentium* and International Law," Amer. Jnl. Int. Law, Vol. XII., p. 56, 1918). The term "*droit entre gens,*" used by d'Aguesseau (Vol. II., 1773, 2nd), and later by Bentham ("Principles of Morals and Legislation," XVIII. 326, 1748-1832), was, doubtless, adapted from Zouch, Professor of Civil Law at Oxford, 1650, who uses the expression "*jus inter gentes.*" Grotius subsequently devolops the idea of a moral law valid *between* nations, not a law of nations (*supra*). The term "*jus gentium*" appears to be derived from Aristotle's "justice unwritten" (Ethics, 8, 13, 5), "a law eternal and controlling, existing independently of human permission or enactment, the law of nature. But as used by Cicero (De Republica, 1, 2, 3 Oratorical Partitions XXXVII.) it is apparent that it has come to mean the Roman System of praetorian jurisprudence. That is to say, "*jus gentium*" was that body of law governing the rights of aliens in Rome which gave its charter to the civil law of the later Imperial period; not the public law governing Roman foreign relations. It was constituted of many modifications of and innovations upon the rigid municipal law of the Republic developed to meet the growing needs of the foreign ocmmerce or Rome, and is to be distinguished from the Greek conception of a universal law of nature. In the

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sixth century, A.D., we see in the writings of Livy a new significance attached to the term "*jus gentium.*" It has come to include the conduct of embassies, the usage of Rome and other nations in the conduct of war. The expression "*jus belli,*" or "*jus belli ac pacis,*" is first used by Livy. He refers the "*jus gentium*" to the time-honoured usage of nations in their public intercourse. To the Roman mind of the early Empire "*jus gentium*" then signifies a "system of at least formal international principles," including "*jus belli,*" the law of war. The "law of nature," greatly popularized in Rome, is observed to have influenced not only the administration of civil law touching the rights of foreigners but the public law of Rome. The same influence is strongly evidenced in the writings of publicists at the beginning of the sixteenth century in their development of a body of law governing interstate relations, and that influence is at work to-day and is actively felt in constitutional and international jurisprudence in American practice. Three political concepts, whose authority the publicists subsequent to the Reformation sought to displace, are noteworthy. The first was presented by the political hegemony of the Roman State, "all power theoretically vested in the people of the Empire," the Emperor imposing the law as a supreme political personality, representing all. The partially theocratic, democratic and republican social organization of the Church based on the teaching of Christ and perpetuating the principles of the Roman Civil Law in the authorities of the canon law. Again, the Holy Roman Empire which found its union in political compacts between its component states and which rested upon the principle that "the great communities of Continental Europe, as independent states, had delegated power for the common purposes of the Emperor and Diet," subject to a moral or quasi-legal Papal control for the protection of the individual as a member of the Church (Snow, "The Law of Nations," Amer. Jul. Int. Law, Vol. VI., p. 890, 1912). It is noteworthy that the British Islands and the Northern States

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of Europe remained outside of this superstate. "To these conceptions of an organized society regardless of or inclusive of states and superior to states and persons for all or some purposes, was opposed the conception which became prevalent after the treaty of Westphalia, of the civilized world as composed of states wholly independent and morally bound by such agreements as they might choose to keep them, or at least so far independent as to be subject in their external relations to no law except that of natural reason and justice, each one interpreting this natural reason and justice according to its own ideas" (Snow, *supra*). In no small degree did this law of nature take of the hue of the moral and political philosophy of Christ and the Apostles—indeed, of the political science of the Old Testament writings (John Milton, "Duties of Magistrates, etc."). The names of Victoria (1480-1546), Brun (De Legationibus, 1548), Belli (De re militari, 1563, Vasquez ("Illustrium Controversarium," 1564, Ayala (De Jure et Officiis Bellicis et Disciplina Militari, 1582), Savres (Tractabus de Legibus ac Deo Legislatore, 1612), Gentilis (De Legationibus, 1585, De Jure Belli, 1588). And finally, Grotius (De Jure Belli ac Pacis, 1625) and synonymous with the broad development of philosophic principles and from thence in modern international law we have two opposing schools; that which emphasized the paramount authority of the law of nature, and the school of the Positivists, who based their ideas upon customs and treaties (G. G. Wilson, *supra*). These schools of international jurisprudence evidence the distinction between the natural law of nations and the voluntary law of nations. "The system inaugurated by Grotius recognized the moral authority of the natural law over the existing practices of nations" (American Jul. of Int. Law, Vol. , p. 38, 1914). Puffendorf was a leader of a school opposed to Grotius in the sense that he regards the law which results from the actual practice of nations as possessed of no authority at all, whereas

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Grotius infers the universality of certain accepted usages of nations as proof of their conformity with the moral law of nature and of reason. The doctrines of Puffendorf in the nineteenth century had practically ceased to assert any authority, while the writings of Hefter, Phillimore and Hall gave added vigour to Positivist doctrines. The Grotian School claims the majority of the prominent French and Italian writers. Bonfils (Manuel et Droit Int. Public, 1894), and Despagnet (Cours de Droit International Public) are two notable successors of the Grotian theory. The former, differentiating between theoretical or *natural* international law and the positive law of nations, "accepts the facts of international life as embodied in usage and treaties, and subjects them to the test of analysis and criticism according to the principles of theoretical international law. Despagnet's method is a little different: "He recognizes that a law between states is a necessary result of the relations which states by their very nature are inevitably led to maintain with one another; but, instead of deducing abstract principles from that relationship, he turns first to the actual rules governing international relations and finds in the fact of their existence the implied consent of nations to abide by those rules. It is this consent, this voluntary adherence of states to the rules under which they live, which constitutes the foundations of international law and gives to it a positive character." (*Supra*). This principle is of peculiar force in American jurisprudence. It distinguishes that body of international law which is of paramount authority under the Constitution, laws and treaties of the United States, and this general law of nations contemplates the higher sanctions of the laws of nature. It is to the sacred obligation of the law of nature and of nations that the foreign relations and interests of the government and citizens of the United States appeal.

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OUR LONDON LETTER.

By Frank Gahan, M.A., LL.B. (Lond.), B.C.L. (Oxon)
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The romantic and unusual has had a dominant place in the courts during the last month. If a novelist had put before his readers many of the stories which have there been unfolded of twentieth century reality, he would have been accused of inventing far-fetched and absurd plots, or of putting in a modern setting incidents of days long past. But day after day the like facts have been proved to the satisfaction of hard-headed judges.

The scuttling cases are the most varied and romantic. They have descended on the commercial court in a perfect avalanche. The ships have in all the cases been foreign ships and usually Greek. The unprecedented slump in shipping, following a time of inflated values, had the effect of making the insurance on most ships an over-insurance. A ship which at the time was insured for well under its then market value, in some cases became worth only a fraction of its insured value. To the owner of a small tramp steamer this difference in values offered a great temptation. Picture the man as shown by the facts of several of the cases. A master-mariner finds that war conditions are giving the despised tramp, which he commands, the power of earning fabulous freights; he believes the upward boom will continue; he puts his life savings into the purchase of the vessel; for a time he earns good freights; then, without warning, like a bolt from the blue, his dream is shattered by the slump, and he finds himself with a vessel, not only incapable of earning profits, but involving a material loss, whether he runs her at uneconomic rates or lays her up. In short, thrifty all his life, he finds himself a ruined man, loaded with debt, harassed on all sides by demands he cannot satisfy, without hope for the future.

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Although in some of the cases a more cold-blooded villainy has been at work, that is the usual genesis of a ship's being cast away.

At first the scuttler doubtless often achieved his object. English marine underwriters pay their losses promptly and without too meticulous an investigation. But the large number of Greek ships which were lost in fair weather — usually by striking a mine — aroused comment. Underwriters became less willing to insure Greek ships. Then more definite suspicions were aroused, and systematic investigations were made. Every loss was carefully scrutinized, and in a number of cases the underwriters refused to pay. The cases they have chosen to fight have been long and complicated, but piece by piece the underwriters have in each of them built up their contention until the court has been driven to find that steamer after steamer has been scuttled. There has been little law in the cases, but they have been interesting illustrations of the use of circumstantial evidence, and they abound in delightful human touches. As an illustration, the case of a Greek steamer cast away in the North Sea may be instanced. The plans had all been completed, and the crew were waiting only for the cook to push off and leave the vessel to her fate. Then the cook appeared, rigged out in his best suit of shore clothes and carrying, carefully done up in a parcel, his more treasured possessions. Simple or avaricious —probably the latter, as he took to blackmailing the captain — only by stern insistence and impatient threats could he be induced to discard his finery and resume a garb more in keeping with a panic-stricken abandonment of the ship; which it was said had struck submerged wreckage and straightway had sunk.

The only important point of law which has arisen is on the rights of innocent mortgagees of scuttled ships. In *Graham Joint Stock Shipping Co. Ltd.* v. *Motor Union Insurance Co. Ltd.* and *Samuel & Co. Ltd.* v. *the same*[1], it was held that such mortgagees are entitled to recover.

[1] 38 T. L. R. 751, 753.

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Another interesting insurance case arose from the mistake of an American captain. Imagining the dust or vapour which rose from a cargo of resin to be smoke from a fire, he took energetic measures for the protection of his ship. He injected into the holds steam at a high pressure, and the steam very badly damaged the cargo. On examination it was, however, discovered that there had in fact been no fire. The owners of the cargo then claimed against an American company which had insured the cargo against fire. Rowlatt, J., however held that losses incurred owing to a peril in fact non-existent could not be recovered—*Watson (Joseph) & Sons Ltd.* v. *Firemen's Fund Insurance Co. of San Francisco*[2].

Of a more popularly sensational character has been the Russell Divorce case. A big array of eminent counsel for days contested before a special jury the faithfulness of Mrs. Russell. She had given birth to a child which, if legitimate, will one day be a peer of the realm. Her husband, however, denied that the marriage had ever been consummated, and charged the wife with adultery with two named and one unknown man. Our grandmothers would indeed have thought the world mad, if they had heard the story unfolded in court. Mrs. Russell had led an energetic, fearless, and Bohemian life; such a life as only a post-war girl could lead. She denied adultery, yet frankly owned to having spent one night in the bachelor flat of one of the co-respondents, and with having travelled by railway sleeper in the same separate compartment as the other co-respondent. Before her marriage to Mr. Russell she had gone to Scotland to marry the first co-respondent, but, finding some technical difficulty in the way, had changed her mind, and had telegraphed to Mr. Russell accepting his offer of marriage. Most amazing of all, on the third day of the trial conclusive evidence was given that this mother, accused of frequent adultery, was shortly before the child's birth

[2] (1922), W. N. 211; 38 T. L. R. 797.

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virgo intacta. Evidence of great interest to medical men was given to account for the conception of the child, and the poor jury was bewildered by having to try as complicated an issue as could well be imagined. They found that neither of the two co-respondents—typical young Englishmen—was guilty; but they failed to agree in regard to the unknown man with whom misconduct was alleged. Consequently the case will be re-tried on that issue.

The lay press which greedily published the evidence in the case in a detail which would have astounded and shocked the editor of a Canadian paper, made further capital out of the case by starting an agitation for the hearing of medical evidence *in camera.* Needless to say, however, legal opinion, however disgusted it may be at the reports in the daily and weekly press of such cases, is strongly against any movement which restricts the publicity of legal proceedings.

A great number of interesting points in less sensational matters have arisen for decision during the month. A customer of a bank paid into his account, and had credited to him in the bank's books a cheque for a large sum, which, however, had to be collected from the drawer of the cheque through other banks. The cheque was duly cleared, but before receiving notice of the fact from the drawer's bank, the bank ceased payment. On a summons by the liquidator, Astbury, J., decided that the bank was a mere agent for collection, and that their authority to collect was determined by their closing their doors. Consequently the liquidator was ordered to pay to the customer the full amount of the cheque: *In re Farrow's Bank Ltd.*[a]

Ex-soldiers will be interested in the attempt of another bank to recover from an officer overpaid war gratuity. Lieut.-Col. Markham quite accurately filled up the official forms and received a substantial cheque as gratuity. This money he unfortunately invested in

[a] (1922), W. N. 250.

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an unsound manner, and the whole was lost. There was therefore no question of following the proceeds. The bank, however, on discovering that they had, by failure to examine all the documents, paid too large a sum, sought to recover the amount overpaid. Lush, J., in a considered judgment, held that the officer was entitled to retain the whole sum.

The end of the legal year finds the Privy Council with only two cases on its list unheard. They are both Indian cases postponed at the request of the parties. The Committee with admirable promptness announced that it would advise His Majesty to dismiss the Grand Trunk appeal, although it will formulate its reasons later. English investors, however, despite the failure of the appeal, undoubtedly still hope for financial concessions from the Canadian Government. The House of Lords also has disposed of all its work, and the other courts are well abreast of their work. Undefended divorce cases are now to be taken on assize—a much-approved reform. The non-jury list in the King's Bench Division, however, is still in arrears, although not to the same extent as last year.

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NOTABLE CASES NOTATED.

Master and Servant—Method of Computing Liability.

Royal Trust Company v. *C. P. R.*[1] is an Alberta Case, finally determined by the Privy Council on the question of the correct method of computing the compensation payable under Consolidated Orders of the Province, or rather of the old N. W. Territories, which correspond with the Fatal Accidents Act, 1846, of England, commonly known as Lord Campbell's Act.

The liability of the Railway was not disputed, but the amount of compensation payable to the dependents of the man killed was in issue in the present appeal.

The trial Judge fixed the compensation at $80,000, and apportioned it between the widow and child of the deceased. On appeal, the amount adjudged was reduced to $40,000 and reapportioned, but in such a way that the child got the same amount ($15,000) under the reduced verdict as it had got under the original verdict for twice the sum. Only the amount payable to the widow fluctuated from $65,000 under the original judgment to $25,000 under the appeal judgment. The Privy Council disagreed with the rulings of both Courts and fixed the amount payable at $57,000, apportioning $42,000 to the widow and $15,000 to the child.

Lord Parmoor, who delivered the judgment, reaffirmed the principle laid down by Lord Watson in *Grand Trunk Railway* v. *Jennings*,[2] and stated that the compensation is restricted to the amount of actual pecuniary benefit which the family might reasonably have expected to enjoy had the deceased not been killed. Lord Watson, in the case quoted, said:

"It then becomes necessary to consider what, but for the accident which terminated his existence, would have been his reasonable prospects of life, work and remuneration; and also how far

[1] 38 T. L. R. 899.
[2] 4 T. L. R. 752.

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these, if realized, would have conduced to the benefit of the individual claiming compensation."

Statute of Limitation—Written Acknowledgment.

Spencer v. *Hemmerde*[3] is a decision of the House of Lords, reversing a judgment of the Court of Appeal and reaffirming a judgment of the Trial Judge as to what acknowledgment of a debt barred the operation of the Statute of Limitation; or rather what acknowledgment implied or involved a promise to pay so as to make the new promise a new obligation, founded upon the consideration of existent and anterior indebtedness.

The Statute of Limitation was passed in 1623, and it absolutely barred actions upon simple contracts after 6 years. But the Judges in the time of James I., and for many years subsequently, were law-makers and not merely what they are to-day, law-declarers; and they began a series of decisions, which had no statutory or other sanction, to the effect that where there had, within the limitation period, been an acknowledgment of the debt or obligation, either accompanied by an express promise to pay or of such an unequivocal character that a promise to pay was inevitably involved or implied, the operation of the statute was barred; and that a new obligation from the date of the acknowledgment was created as I have stated.

Except the Statute of Frauds, I know of no Legislative Enactment which has had so many leading cases for its interpretation, or rather for the building up of the judge-made theory for its evasion—an acknowledgment and a promise to pay either express or implied. And now comes this last case, covering some ten pages of the *Times Law Reports,* in which the old structure of evasion is re-examined and rebuttressed in the House of Lords, who, although they were unanimous, over-ruled the Court of Appeal, which was very far from unanimous; and they restored the judgment

[3] 38 T. L. R. 869.

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of the Trial Judge which the Court of Appeal had reversed.

Taking the original cases which laid down or evolved the theory or principle that the operation of the statute stopped by a promise to pay of some kind, as good law, the law has never since been in doubt, and particularly since Lord Tenterden's Act of 9 Geo. IV. cap. 14, which provided that "no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the said enactment . . . unless such acknowledgment or promise shall be . . . in some writing to be signed by the party chargeable thereby."

The crux presented by each case which has arisen has been, where there was no express promise, what acknowledgment was sufficient to imply a promise. Lord Tenterden's Act obviated all the anterior wrangling over oral communications between the creditor and the debtor. But the wrangle continued no less acutely over the writing required by Lord Tenterden's Act.

Nothing like a clear principle can be laid down, and no attempt was made in this case to lay one down. The whole field of decisions was gone over; but Lord Atkinson perhaps stated the problem as acutely and tersely as it is possibly to do when he says:

"The principles applicable to cases such as this are well established. The difficulty arising in any particular case consists in the difficulty of applying those principles to the particular facts of the particular case."

And by Lord Justice Atkin in the Appeal Court, where he says:—

"The creditor can only meet the Statute by showing a new cause of action arising within the period of limitation." And further: "In the class of acknowledgment now under discussion the previous debt has always been held to be sufficient consideration though past to support the fresh implied promise." "I think we are to consider the question on principle, and the principle is, looking at the whole of the language used, are we to infer a promise in fact to pay."

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It is, in fact, a question always of the construction of the language used.

But we must always remember a debtor might acknowledge a debt in such a way that no promise could be implied, and in the judgment of the Court of Appeal this had been done in the present case. The House of Lords thought otherwise. They held the promise was essentially implied. Of course the acknowledgment might be accompanied by a refusal to pay; and then the promise could not be implied, though I saw it laid down in a Canadian case some years ago, which at present I cannot lay my hand on, that where there was a clear acknowledgment of the debt, a refusal to pay was repugnant to the acknowledgment, and it must be ignored and a promise to pay implied. It was high-class sophistry no doubt, but whether it was reversed on appeal or not I am unable to say.

The Reader will find all the available cases referred to in the case under discussion.

Trial by Jury—Jurors absent when verdict delivered —Application for new Trial — Affidavit by Juror.

In *Ellis* v. *Deheer*,[4] an action for damages for personal injuries, the Court of Appeal in England made an order for a new trial on proof that one or more of the jurors were not present in Court when the verdict was delivered and did not assent to it. Affidavits by jurors were admitted, proving that they were not in Court and did not hear the delivery of the verdict. One of the jurors swore that had he heard it he would immediately have protested. The protest was not made until the following day, after the jury had been discharged. It was held, however, that this delay afforded no ground for refusing to grant a new trial.

The circumstances were peculiar, but the authorities show that they have arisen before, and they may arise again. It appears that when the jury returned

[4] (1922), 2 K. B. 113.

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to Court they found the jury box occupied by another jury trying another case. There was not sufficient space available in the body of the Court for the jurymen to stand together. The foreman therefore went into the witness box, two or three others stood near him, and the remaining jurymen stood in a gangway behind the jury box, which had a high back, some of them being out of sight of the bench. The foreman announced what purported to be the verdict arrived at, and judgment was entered. As already mentioned, one of the jurymen stated to the Court next day that owing to his position he did not hear what the foreman said, and that if he had heard he would have told the Court that such was not the verdict arrived at. Two other Jurors stated on oath that they did not hear the verdict.

When a verdict is delivered in the sight and hearing of all the jury without protest their assent to it is presumed. But there is no such presumption where some of them did not hear it delivered. And affidavits of Jurymen are admissible as evidence of what took place in open Court.

Affidavits of Jurymen are not, of course, admissible as to what took place when considering the verdict, either in the jury box or in the jury room, nor as to the reasons for the verdict. Banks, L.J., refers to this (p. 118):—

> "I may say that I saw the other day, with astonishment and disgust, the publication in a newspaper of a statement by the foreman of the jury in an important criminal trial as to what took place in the jury room after the jury had retired. I do not think it necessary to express any opinion as to whether such a publication amounts to a contempt of Court, but I feel confident that anyone who read that statement will realize the importance of maintaining the rule."

The other Judges (Warrington, L.J., and Atkin, L.J.) were equally clear as to the impropriety of such publication.

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Resealing of Ontario Probate in England.

In Re McLaughlin, Deceased[5] is a recent case in which the Judge of Probate in England considered the question whether a Probate granted by a Surrogate Court in Ontario to a Trust Company having its head office in Ontario, could be resealed in England under The Colonial Probates Act, 1892.

The Registrar had refused resealing on the ground that it was not in accordance with the practice of the English Court to grant Probate to a Corporation which had not its principal office in the United Kingdom, nor to reseal a grant made to a person or Corporation incompetent to take a grant in England.

It was held that it could be assumed in view of the Administration of Justice Act, 1900, that the law does not object to Corporation Executors *per se;* and as under the Colonial Probates Act, 1892, the Court has a discretion, no harm would be done and business would be simplified if the Order applied for were granted. The Ontario Probate was therefore permitted to be resealed.

Sale of Goods—Delivery.

In the case of *Galbraith and Grant, Limited* v. *Block,*[6] an action for goods sold and delivered, the defence was an admission of the contract but a denial of the delivery. The goods consisted of a case of champagne, which, according to the contract, was to be delivered at the defendant's premises. The case was, in fact, delivered at the defendant's premises, but was received there by an unauthorized person who misappropriated it.

The judgment of the Court (Lush and Green, JJ.) was delivered by Lush, J., who said that:

> "A vendor who is told to deliver goods at the purchaser's premises discharges his obligations if he delivers them therewithout negligence to a person apparently having authority to receive them. He cannot know what authority the actual recipient has.

[5] (1922), 2 K. B. 235.
[6] (1922), 2 K. B. 155.

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His duty is to deliver the goods at the proper place, and, of course, to take all proper care to see that no unauthorized person receives them. He is under no obligation to do more. If the purchaser has been unfortunate enough to have had access to his premises obtained by some apparently respectable person who takes his goods and signs for them in his absence, the loss must fall on him and not on the innocent carrier or vendor."

The Trial Judge had held that there was no delivery to the defendant and had accordingly given Judgment for the defendant. The Divisional Court did not agree with his view of the law and expressed their view as above. A new trial was ordered on the one question whether the vendor's agent had exercised all proper care in handing the goods over to the person who took them and signed for them, a matter which did not appear to have been considered at the trial.

Construction of Contract—The Ejusdem Generis Rule, Meaning of Videlicit and Etcetera.

The Court of Appeal in England has allowed the appeal from the decision of McCardis, J., in *Ambatielos* v. *Anton Jurgens Margarine Works*,[1] a case which raised points of interest and importance.

A vessel was chartered for a certain voyage and the charterers bound themselves to unload the cargo within a specified number of days. This obligation, however, was subject to an exception, expressed as follows:—

"Should the vessel be detained by causes over which the charterers have no control, viz.: Quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, etc., no demurrage is to be charged, and lay days not to count."

The vessel was detained for a period considerably longer than that specified, the cause of delay being a strike of dock laborers. The question was whether a delay arising from that cause was within the exception. The Court of Appeal held that the governing words of the exception clause were "causes over which the charterers have no control," and that the strike was therefore within the exception.

[1] (1922), 2 K. B. in 185.

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It was held, in effect, that the word *"videlicit"* in this particular clause had the tense of "for example," *"etcetera"* simply meant "and so on."

It was argued (unsuccessfully) that the *ejusdem generis* rule should be applied, and the general words "causes over which the charterers have no control" limited to causes of the same *genus* as those specified. In effect, this argument involved the necessity of transposing the general and the specific words; but it is clear that to do this would be to make a new contract. There appears to be no reported case in England in which the *ejusdem generis* rule has been applied to a contract in which the general words precede the specific.

The hearing on the subject of the *ejusdem generis* rule of construction may be found in *S.S. Magnhild (Owners)* v. *McIntyre Bros.*[8]

[8] (1920), 2 K. B. 321; 89 L. J. K. B. 1110.

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BOOKS RECEIVED FOR REVIEW.

Guide to Law of Property, 1922. By W. E. Wilkinson, LL.D. London: Solicitors Law Stationers Society, Limited. Toronto: The Carswell Company, Limited.

War and Armament Loans—The Carnegie Endowment Series for International Peace. New York: Oxford University Press. Toronto: The Carswell Company, Limited.

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The Canadian Law Times.

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EDITORIAL.

The Editorial has come to be so much a feature of the CANADIAN LAW TIMES that an issue without it is like an Eagle divested of its wing. The simile is not so strange as it seems. Alas poor wing, and the Eagle too! That is all we say. Those who watched its flights can at all events say it soared high, but never flopped; for it measured its distance and capacity before it ventured aloft; and it never returned without penetrating the area designed, and without planting in its darkest recesses such a glow of illumination as dispelled forever the sombreness of the past. But Light is not always agreeable even in the dark places of Law. There are types—types of what I do not say—who love darkness, flourish in it, and shun the light. The Editorial was an illuminator by brief corruscations; and brevity is the soul of wit and the crystallized essence of knowledge. As such condemn it who will! As such improve it who can!

I have been reading some parts of Mr. Osborn's Book reviewed *post*, and I felt flattered or consoled by the identity of his thoughts with those which I have been formulating in the Editorials of the CANADIAN LAW TIMES for now nearly three years. He writes as one charged with a Mission, and he is an enthusiast for achieving results. Chiefly he is intent on the uplift of the Lawyer to the dignity of his Profession; and he insists on the essentials of original ability, culture

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and character in every one who aspires to the attainment of that dignity. He draws an acute line between the Lawyer who, having attained his status, rolls himself into a chair and ceases to read anything but what the individual case before him compels him to read, and the Lawyer who, having been called, feels himself released from the trammels of prescribed law courses set for examination purposes, and instantly sets himself to study systematically branch after branch of jurisprudence. The first inevitably becomes stagnant and generally degenerates into a merely business machine, while the second is always progressing, reflecting new light and new knowledge as he goes along to the wonder of the gazing throng of those who, in their training days, studied side by side with him but fell into the other category.

In the beginning one sought the easy path, and the other the rough road; but in the end how different is the result—to the man himself and to the Community in which his lot is cast!

Mr. Osborn deals with a great variety of subjects in which the three elements I have named are brought into operation—ability, knowledge, and character; and of the three he is most insistent on character—the character of all that is summed up in the word "Gentleman." Without this the other two are ignoble; for they only enable the possessor of them to gain temporary advantages either for himself or for those who for a price can command the use of them. The advantages he gains may not be wrong or unjust; but unless a man has character, there will be times when temptation will overmaster him and he will yield himself to co-operating in something which is wrong, or mean or contemptible. For the class of men who yield themselves to such temptation Mr. Osborn has scathing denunciation, not so much for the obloquy in which they immerse themselves as for the deplorable effect it has upon the mind of the multitude, who all too frequently form opinions on the principle of *ab*

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uno omnes, and conclude that the whole fraternity of Lawyers are the same, and the Profession of the Law a despicable thing, an ally of corruption, deceit and guile.

The Professors and Teachers of Law in our Colleges and Schools should take this Book and make the parts of it which deal with character, texts for the inculcation of the young men who assemble in the class-rooms for instruction, and who, in many cases, without realizing the shoals and quagmires and cesspools *en route,* only feel that they are being burnished for a quick race to the goal of riches.

Ambition of attaining the potentials of public positions in the Commonwealth used to be the incentive of the aspirant for the Law; and now too frequently the only ambition is to make money. The soul of honour is only the inner casket of that character which every true Lawyer should carry with him in all his relations and activities of life.

B. T.

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CORPORATE COMPANIES.

CAPACITY v. POWER.

Opinion of Sir Francis Gore-Browne, K.C.

On the question which has been under discussion in the CANADIAN LAW TIMES since March last,—Whether the doctrine of *ultra vires* is no longer applicable to Incorporated Companies—the following has been communicated to us as the opinion of the late Sir Francis Gore-Browne, K.C., in his lifetime one of the leading authorities upon Company Law, as to the effect upon the Companies Act of Ontario of the following Section added to it as an amendment in 1916 (6 Geo. V. cap. 35, sec. 6):—

210. Every Corporation or Company heretofore or hereafter created

(a) By or under any special or general Act of the Parliament of the late Province of Upper Canada;

(b) By or under any special or general Act of the Parliament of the late Province of Canada, which has its head office and carries on business in Ontario, and which was incorporated with objects or purposes to which the authority of this Legislature extends;

(c) By or under any of the Acts repealed by the Ontario Companies Act, 1907, or under any Act for which any of such repealed Acts was substituted, or to which any of such Acts was applicable;

(d) By or under a Special Act to which any of the provisions of The Ontario Joint Stock Companies General Clauses Act or any Act for which that was substituted were applicable.

(e) By or under any general or Special Act of this Legislature;

shall, unless otherwise expressly declared in the Act or Instrument creating it, have, and be deemed from its creation to have had, the general capacity which the Common Law ordinarily attaches to Corporations created by Charter.

Sir Francis said:

"To make a contract or do other act the party must have capacity. An individual gets capacity by being born and attaining full age. He is then capable in his own country of contracting. A Foreign

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Country makes its own terms. It can fix a different age for every or any purpose, *e.g.*, for marriage; it can even prevent an alien from contracting at all, as it does in the case of enemies, or can prohibit the holding of land or of certain offices by aliens. The Municipal law of the Country of the individual cannot affect such matters. The subject of a country where full age is 21 may if the laws of another country allow contract at an earlier age.

"With Corporations I take it a similar rule prevails. Any country can say for its own subjects what are the necessary conditions for the creation of a Corporation. When incorporated the Company is a person having "capacity" to contract; but the country in which it is incorporated may further prescribe under what conditions it is to contract at home, and a contract not complying with these conditions is *ultra vires* and void. Should such a Corporation purport to contract abroad, it will be the laws of the Foreign Country which will declare whether or not the contract has validity. Not infrequently a Country forbids the carrying on of any business unless the Corporation has been registered in the Country in question. This seems to me to be the 'ability or power to contract' as distinct from the 'capacity of contract.'

"It is said generally that a Chartered Company has unlimited capacity and in the Country of its creation unlimited ability to contract, and that any prohibitions contained in the Charter are directory only, and the remedy for an excess in the exercise of these powers is by a petition to revoke the Charter. On the other hand a Statutory Corporation (*Att.-Gen.* v. *G. E. R.*), including one registered under the Companies Acts (*Riche* v. *Astbury Carriage Co.*), exists only for the purposes for which it is created, and any act outside those purposes is *ultra vires* and void. This would seem to be a limit on the "capacity" of the Corporation to contract and to be applicable wherever the Corporation attempts to carry on its functions.

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The case may be put by saying: 'In purporting to make a contract for purposes other than those for which it is formed there is no Corporation, and therefore no party to the intended contract.'

"In Canada you have a state of things unknown to us, viz.: Dominion Corporations and Provincial Corporations, and I have not the knowledge necessary for discussing the situation in territories where there are two Laws in operation at the same time; but it seems to me that 6 Geo. V. c. 35, s. 6, was intended to give to every Corporation created under the Act of the legislature the same capacity and *power* to contract at large as a Chartered Company would have, otherwise it would be ineffective, for without that section it would necessarily have both capacity and power to do the acts for which it was incorporated, and I cannot think it contemplates that the Corporation has capacity but requires some further act of the legislature to give it power to do acts, *but I admit that this is giving the word 'capacity' more than its proper significance.* If this is so, the omission to express certain purposes would not prevent the corporation from having both capacity and power to effect those purposes, but as the section quoted contains the words 'unless otherwise expressly declared in the act or instrument creating it, it would seem that an Act of the Legislature may (unlike a Charter) impose restrictions, which I submit would be effective in rendering a purported act in defiance of them invalid.

"Of course this view depends on my former opinion that in the Act of 1916 'capacity' was intended to have a meaning including 'power' or 'ability.' If I am wrong in that, then a Statutory Corporation while capable of doing all things has only power to do those specified or implied as being purposes for which it is created."

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EDITOR'S COMMENT.

Sir Francis Gore-Browne has just passed away—since he gave the foregoing opinion. His prestige and standing are undoubted as an authority during the past 20 years on the Law of Joint Stock Companies. His present opinion needs, here, little comment. It accords with what we have written,—that unless "capacity" is read as meaning "power" in the amendment referred to, and in somewhat identical amendments in the Companies Acts of the various other Provinces, the doctrine of *ultra vires* is undisturbed and is still intact. In the *Bonanza Creek Case,* which gave rise to the amendments, Lord Haldane acutely drew the line between "capacity" and "power," and must have had the distinction in view when he dropped the *obiter dictum* phrase, which found itself soon after on the Statute Books of the Provinces of Canada—that it was competent for any of the Legislatures to confer "on Corporations the general capacity which the Common Law ordinarily attached to Corporations created by Charter." I do not dispute this Legislative competence; but I claim that our Companies Acts having already created statutory Companies with limited capacity and limited power, the Legislature cannot by an amendment, such as Section 210 set forth above, transform such statutory Companies into Common Law Corporations as regards both powers and capacities. If such Companies are desired the old statutory creations have first to be demolished. I claim, moreover, that there was no "intention" in the amendment of 1916 to extend the *powers* of Companies constituted under the various Companies Acts. *Powers,* as distinct from *capacity,* were not before either the Privy Council when Lord Haldane used the phrase or sentence quoted, or before the Legislatures that enacted it almost verbatim. It was "capacity" only which the Privy Council held was inherent in the Bonanza Creek Company—the capacity, namely, to acquire the power or right to carry on its operations outside the Pro-

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vince of its origin; and it was this capacity *only* which the Legislatures proceeded to confer on all corporations constituted under the various Companies Acts and other Provincial enactments. There was no "intention" to augment the *powers* under the creating Statutes or to enlarge them into the *powers* of Common Law Corporations. Section 210 quoted above was only an amendment. Before the amendment the Company in Ontario was regarded, and treated by the Bench and Bar alike, as a Statutory Company restricted and limited by the Act creating it and controlled by the doctrine or principle of *ultra vires*. Shareholders and investors found their protection and safeguard under the Acts as so understood, and in the doctrine of *ultra vires* which was the equitable sanction behind the Acts; and in the absence of express words it could not be inferred, merely because a critical issue had revealed the expediency or necessity of the Legislature declaring by Statute that every Provincial Corporation should henceforth have the *capacity* to acquire *ab extra* the power to carry on its business beyond the Province of its origin that the Legislature *intended* also to enact that the powers of the Company should be no longer the statutory powers, as previously defined, but should henceforth be the power which the "Common Law ordinarily attaches to Common Law Corporation"—that is the power to carry on any business whatever, regardless of the restrictions of the creating Statute. Such a straining of words is not only repugnant, but fraught with consequences diametrically opposed to every fundamental of the scheme or conception of Joint Stock limited liability Corporations. To avert such a ruinous absurdity, we must construe the word "capacity" in its natural sense, and this leaves the powers of the Company under the creating Statutes untouched, and the doctrine or principle of *ultra vires* still in full operation with regard to any violation of them.

In this connection we draw attention to the reasons of Mr. Justice Hodgins, J.A., of the Appellate Divi-

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sion, Ontario, printed verbatim in "Notable Cases Notated," *post,* and rendered by that eminent Jurist in the case of *Waterous Engine Company* v. *Town of Capreol* in the month of April last. The case is not yet reported; but the Judge's reasons are illuminative of the present subject, though the restricted nature of the case before him prevented the complete removal of the confusions produced by the ill-starred Legislative amendment in 1916 of the Provincial Companies Act.

Another case in complete harmony with this is *Canadian Bank of Commerce* v. *Cudworth.*[1]

We may add both these cases, as well as the opinion of Sir Francis Gore-Browne, should be read in conjunction with *Attorney-General* v. *De Keysers Hotel,*[2] commented upon and applied to Canadian Company Law in the August issue, C. L. T. Vol. 42, page 525.

October, 1922. B. T.

[1] (1922), W. W. R. Vol. 1, p. 287; C. L. T. Vol. 42, p. 497.
[2] 1920, A. C., p. 508.

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BODIES CORPORATE AND POLITIC.

By H. G. Garrett, Registrar Joint Stock Companies, British Columbia.

"I take them for my pleasure to see the diversitie of the humors of men."—Lord Burghley.

An office for recording corporations is not such a monotonous place as many would think, and that is why the words of Lord Burghley, the wise old statesman, who helped to guide Queen Elizabeth's counsels, are taken as a motto for this paper. I lighted on them by chance somewhere, but, as phrases often do, they seemed to crystallize a lot of straying, disconnected ideas on the fascinating subject of my title.

If of course one regards merely the formal documents, the scraps of paper, by which this and that corporation is to be identified, such an office is just a kind of government factory, provided with appropriate legal machinery for turning out, keeping in repair and destroying fictitious persons. In truth every office mainly concerned with routine matters — and what a large portion of existence on this planet is so consumed!—can be a dull place, unless the daily task is seasoned with a spice of fancy and enthusiasm.

While documents of corporate bodies hold something of the mysterious virtue of parchment and wax, as Burke styled it, they are only the outward garb. Behind and within those corporate forms, there lurks a psychological reality, representing the joint motives and wills that have inspired the creation, and will be the soul of the offspring of statute, a theme worthy of a modern Sartor Resartus. He would be a dreary official who did not in the course of his functions penetrate the paper and ink and visualize sometimes the pageant of life which passes before him in the process

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of making and unmaking corporations. His imagination can, if it will, speculate on the Protean shapes which human energy assumes — the complexity and interdependence of the manifold phases of organized society. He will marvel at the astuteness, even the grandeur of the human mind, and contrast with such qualities its pitiable simplicity and merciless cunning. A judge once observed that a corporation was a thing which had neither soul to be damned nor body to be kicked. But that is a superficial view. Inasmuch as every corporation is an aggregate of human beings, it must to some extent be a compound of their characteristics, as related to the purposes which they contemplate, and so it will take on a hue and complexion in accord with the various emotions and mental operations of its constituents.

The persons who organize a corporation and carry on its business are the real elements in its composition. Their characters, their principles, habits, idiosyncrasies, are its "aura" as it were, and shine through the forms of law which make its bones and framework. Does not every corporation acquire a reputation in the same way as a man? It is known to be honest, efficient, courteous and so on, because there is a spirit that pervades it and public opinion stamps it accordingly. And so a Registrar dealing daily with promoters, lawyers and others becomes familiar with their different methods and classes of business. He gets to know their peculiarities and affiliations—their aims and even their prospects. He can almost predict the future of a corporation from the circumstances and parties associated with its generation.

Now picture for a moment the rôles and functions of the Registrar, before whose eyes a corporation will often complete the cycle of its existence. In no way party to its conception he cannot be styled its father, but he is the statutory midwife that brings it into this world after the labours of compliance with the law of its creation. Nor can he be called a godfather

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after it has been baptized with a minimum of cold cash or endowed for life with valuable property (as the case may be), and then certified as having been confirmed: he is rather the *persona designata* performing a ceremony. He may, as occasion requires, be guide, philosopher and friend, or pedagogue and sergeant, sometimes wielding a big stick, which at a distance from the official sanctum looks (except to hardened wrongdoers) like a sword of Damocles. Then as the sands run out and fate draws nigh, he is transformed into the shape of undertaker and sexton or Lord High Executioner and common hangman. At all times he is liable to be cursed with bell, book and candle as an extortioner and public nuisance. Epitomised analogically he is the Registrar of Births, Deaths and Marriages of artificial persons.

Glance too at the circumstances that accompany the birth of a fictitious infant — too often literally "infants"—brought into this wicked world not only "tied hand and foot," as the courts have put it, but tongue-tied. Think of the case where evil designs on the poor, unsuspecting public are hatched and tortuous statutes must be tortiously circumvented: where the corporation is conceived in iniquity and should be predestined for the gallows, were it not that the arm of the law is often shorter than the long head of the criminal. What name shall this child of sin be given? It will be no rose and the matter is of high importance to the plot. Again, in what shape shall the child be created and how clad? What shall be its constitution and the articles wherewith it shall be attractively attired? And then the avails of its prostitution—ah! how shall they be quickest realized? Of course it would be slanderous to think of corporation organization in general in this light, but the picture drawn serves to illustrate what is embodied in a mere piece of paper, innocent on the surface but to the experienced eye, bearing all the marks of the cloven hoof.

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And so we pass to the stage when the youngling has been born and launched on the world with a certain capacity, certain powers, certain embryo aims, like any human progeny. It develops and sets about its life-work. The majority will settle down to good, honest labour—others embark on a career of adventure, taking a chance wherever it offers or by contrast pursue a cautious path, carefully building up their resources. Some will display an immoral greed of gold and stop at nothing to amass riches; others with more conscience will really endeavour to benefit their country, while profiting themselves. Always there is the subjective as well as the objective side, and often the plain, unvarnished tale can be read in those documents whereof we write. Consider what a mine of information—not for the purposes of investment or of cross-examination—is enshrined in every prospectus, read with Carlyle's "seeing" eye. In its crude shapes it is a flaunting advertisement, incapable one would imagine of deceiving even the most credulous human "fly"—stinking in reality of dishonesty, a tissue of lies naked and unashamed. But the more cunning kind, drawn with a skilful pen by a subtle brain, is always fascinating and one can often hardly blame the deluded investor for responding to the Siren call. Its meretricious promises are set forth to soft music to which he listens with ever-growing faith until he passes into dreamland—and writes out his cheque. Whereon one may comment that even an uninteresting thing like a "return of allotment" illustrates human nature and particularly how deeply implanted in our race is the instinct of gambling. The public always seem to be itching to part with its money. Boom succeeds boom—real estate, oil, gold, whatever it may be—but the public never learns that the company promoter is not an altruist but a bloodsucker, inviting them into his parlour. Both parties are trying to get wealth without working for it, but Mr. Financier holds

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all the trumps. He appears to be smarter than the politicians, for he can fool the public all the time.

The test of life for a corporation is the world of trade and commerce, that is where in competition it must play its tug-of-war. Bacon's aphorism that some are born to greatness, some achieve greatness, some have greatness thrust upon them, is applicable to corporations as to men. The first class includes those which exploit some wonderful invention or a rich mine; the next will embrace those concerns which by honest, unremitting industry, combined with shrewdness and judgment, build up, brick upon brick, client after client, a flourishing and permanent business. The last genus is more difficult to illustrate, but luck, influence and similar factors enter into corporate, as they do into the natural person's life. We have all heard of the man who prospers whatever he touches, and so it will be with the corporation—a fortunate deal or an unlucky accident may make or mar its career. But the average corporation must, like Bunyan's tub, stand on its own bottom. Difficulties will be met to be surmounted. Ignorance, extravagance, crookedness, the whole gamut of sins of commission and omission, will bring their aftermath just as success will follow on the heels of the qualities described by Smiles for the benefit of (I fear) past generations of mankind. Moreover a corporation, being in the last analysis a compound of individuals, may become a loving family or a mere aggregate of discordant elements, where one faction endeavours to dominate another. Dishonesty within or internecine warfare will bring about a downfall just as the triumph of vice over virtue in the soul of a man will ruin him.

The last phase is decrepitude, tottering to the grave or even sudden death. A corporation often achieves its purpose and peaceably puts an end to its days, or having passed through Disraeli's three stages of life—illusion, disappointment and regret—be ready and willing to "shuffle off this mortal coil." Others

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become exhausted by the struggle for existence and its varied vicissitudes or are wrecked by fraud or incompetence—of them the law takes charge and winds up their shroud. Some will pass amid regret to the grave; others again "unhousel'd, disappointed, unaneled!" To all the Registrar performs the last rites and obsequies, and buries their remains in his cemetery. But the panorama goes on, exhibiting new features from time to time, as man discovers new worlds to conquer or solves fresh secrets of the earth.

H. G. GARRETT.

Victoria, B.C.

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LORD HALDANE:

Philosophy and Lucidity of Language.

For many years Lord Haldane has occupied a foremost place among Britain's great Jurists; and his influence upon Canadian development—the untieing of the tangles, the exposition of the Constitution and the harmonizing of the Laws of Canada and other Dominions of the Crown—has been transcendent, that is it has surpassed that of any other individual man for the past dozen years or more. His Judgments have to many men appeared, now and then, somewhat mystic. But this did not arise from a scant but from a superabounding knowledge which on many occasions has received expression in language reflective of the wealth and depth of its source. It consequently diverged from the cast-iron phrases so usually found in Law; and tinges of metaphysics were here and there visible, just as they were in the Judgments of his great predecessors Lord Watson and Lord Cairns.

It is this very tinge which imparts to the judgments of Lord Haldane, just as it did to the judgments of the two illustrious predecessors we have named, their value as illuminators, and their worth as permanent declarations of the equity side of our Jurisprudence.

Justice, with its eternity and ubiquity of principle, is not founded on dogma; nor is it confined by the rigidity of purely law theories. Justice is the elastic element of our Jurisprudence as we find it to-day in the legal system of the British Empire. Right with its reciprocal Duty, and Wrong with its reciprocal Obligation, are the fundamentals of Justice; and each of them is a metaphysical conception rather than a dry dogma of positive law. It requires the metaphysical mind to express them; and that is pre-eminently the mind of Lord Haldane. He who has it not, let him try to develop it, but let him cease to whine at him who has it.

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Criticism does not warrant denunciation merely because the critic is endowed with an intellectualism inferior to him whom he would criticize. Yet that is precisely what the man with superior conceptions is constantly subject to — the grumbling comment of inferior or jealous mentality.

Here is what Professor A. E. Taylor says of Lord Haldane, though in giving place to it, I do not mean to pass on to Professor Taylor the imputation levelled against a certain class of critics in the past paragraph. Professor Taylor may be all he claims to be, and he may be right about Lord Haldane's philosophy and his power to give adequate lingual expression to it. But hear Professor Taylor himself. At least he is interesting. Here are his words:—

"No one can lay down Lord Haldane's latest book without heartfelt admiration of the writer's untiring devotion to what a philosopher whom Lord Haldane venerates very highly called the "noble use of leisure." . . .

Yet, after all, when I lay down "The Philosophy of Humanism," and its precursor, "The Reign of Relativity," the feeling which is strongest in my mind is that I want not to eulogise their author (there are others who will do that abundantly), but to expostulate with him. Lord Haldane has been loudly praised for his lucidity as an interpreter of the difficult thinking of eminent men of science; I want to urge that the explanations are not so lucid as they are said to be, or as Lord Haldane might make them. For my own part, I find that, as I have read a certain number of the works which are being "explained," I can contrive to follow the explanation, in a manner; but if I had to form my notion of what Einstein or Weyl or Max Planck means simply by studying Lord Haldane's interpretation, I am afraid I should be badly at sea. The explanations seem to me harder than the texts on which they are the commentary. . . I believe I can see two reasons for the difficulty, neither insurmountable. One is that, whatever other gifts Lord Haldane may possess, he appears not to have the gift of expression. His style is bad in more ways than one. He is fond of unusual and ugly words for which there are other simple and familiar English equivalents ("foundational," for example. and the dreadful verb "to import" in the sense of "to signify" or "to mean"). His sentences are deformed by violent and unnatural inversions of the English order of words. Worst of all, there seems to run through nearly every argument a perplexing strain of verbal ambiguity which raises a suspicion of confusion of thought. These are all faults which can be avoided and ought to be avoided. One

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is sometimes tempted to suspect that Lord Haldane is paying the price for his diligence in studying so many German books. Of all the great European languages German is pre-eminently the one in which there is no living tradition of prose style, the one in which it is hardest to be clear and graceful and easiest to be continuously ambiguous. If you read too much of it, especially of "scientific" German, without a corrective, the consequences are bound to show themselves in your own work, especially if, as may be Lord Haldane's case, you publish your "first bights" without submitting them to drastic revision. . . .

The other reason is that, wrongly perhaps, I feel a haunting uncertainty about Lord Haldane's real familiarity with many of the matters of which he treats. There is no more dangerous undertaking than that of making an elementary exposition of ideas with which one is not habitually and familiarly at home. And I do not feel quite sure that Lord Haldane is quite at home among the ideas of mathematics and mathematical physics to the exposition of which most of this volume is given. He can, to be sure, paraphrase passages of his authorities about such recondite things as tensors and Gaussian co-ordinates accurately. But when he is speaking on his own account, every now and then one comes upon statements which made one wonder whether he has really thought himself into the physical doctrine of relativity at all. Thus in the present volume we are told more than once that it is the earth, not the sun, which "really" moves. Even if this is meant to be understood with special reference to the diurnal movement, it is clear that the implication is that rotation at any rate is absolute, and it does not appear that Lord Haldane has faced the question whether thoroughgoing relativism can be reconciled with belief in absolute rotation. On pp. 43-44, there is a still stranger paragraph about the planetary motions. Its plain grammatical sense seems to be that the planetary "orbits" are completely accounted for by the "real" movement of the earth, and that but for the earth's motion, Venus, Mars, and the rest would appear to move in straight lines. This, of course, implies an entraordinary confusion between the very complex and irregular apparent path of a planet in the sky and the orbit, as described, for example, in Newton's "Principia." It seems incredible that Lord Haldane should forget that by the orbit of a planet we mean the path relative to the common centre of gravity of the sun and the planet, not the path as seen from the earth, or again, that the planet has a "proper" motion of its own which cannot be made rectilinear by regarding this centre of gravity as motionless. But if he has not forgotten this elementary consideration, it is equally incredible that he should deliberately write what must suggest a wholly false interpretation to the simple-minded reader. So the last sentence of p. 174 would inevitably be understood by anyone who did not already know something of analytical geometry to mean that you get two different measures of length, for example, for a chord of a circle, according as you use "polar" or "rectangular" co-ordinates. At least, if Lord Haldane does not mean to assert this astounding unfact, he has expressed himself with very culpable carelessness.

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Nor is it only in dealing with modern themes that Lord Haldane allows himself this kind of laxity. He is rightly anxious that full appreciation should be given to the great constructive thought of the Greek philosophers. Yet one may be pardoned for doubting the accuracy of his representations of even so well-known a philosophy as that of Aristotle. We find him, for instance, identifying "ultimate reality" with knowledge itself, and "full knowledge" with "thinking about thinking," and crediting Aristotle, from whom this phrase is taken, with the resulting metaphysical doctrine that the only thing which is quite real is "knowledge knowing itself." Now, as it happens, Aristotle taught no such thing. What he meant to describe by the curious phrase, "thinking about thinking" was not "full knowledge," but God's thinking, and the whole point of his rather bizarre view is that God's thinking is not "full knowledge." He wants to maintain that God does not know most things. He does not even know of the existence of the world which derives all its life and motion from Him; still less does he know and care for His human creatures, as Plato had maintained. Yet, in Aristotle's view, the world and we ourselves, though so inferior in worth to God as to be altogether excluded from His thought, are as real as God Himself is. So, again, the further identification of God and His thinking with the so-called "active reason" in us, which Lord Haldane makes in this passage and elsewhere, has no warrant at all in the text of Aristotle, who never uses the name "active reason," and has only two or three brief sentences about the thing. The meaning of these sentences, as Lord Haldane should know, was for centuries one of the most keenly debated of problems. What he does himself is simply to adopt an interpretation put forward by certain modern Hegelians, and to give out this almost certainly mistaken interpretation as though it were the explicit statement of "the philosopher" himself. A reader who is familiar with the text of Aristotle and with the history of its interpretation will not be harmed, but there is a very real danger that many of Lord Haldane's readers will be misled into supposing, on the strength of Lord Haldane's reputation, something which is the very reverse of a fact."

How far these views will affect or derogate from the prestige of Lord Haldane as a great exponent of recondite principles of Justice and Right, it is for those who have based their estimate of him upon his long career as a Lawyer and a Judge, to say. How far?

October, 1922. B. T.

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SALIENT FEATURES OF THE BRAZILIAN LAW OF SALE.

By Charles P. Sherman, D.C.L.*

Brazil, a country larger than the United States, and also the largest country of South America, enjoys the incalculable blessings of a *codified* jurisprudence. The present Civil Code of Brazil, which went into effect January 1st, 1917, is the most modern of the Modern Codes in both the Old and the New World.[1] Moreover, the Brazilian Civil Code compares favourably with the best civil codes of Continental Europe.

But the present admirable codification of Brazilian law was not attained without a long and arduous struggle. In the year 1850, after nearly twenty years' effort of preparation, the Commercial Code was realized and went into effect.[2] The urgency of a Civil Code, recognized in the original constitution of the Brazilian Empire, was responsible for the legislation in 1855-1859 whereby the work of codification was entrusted to Texeira de Freitas (now admittedly regarded as the most creative jurist of all Latin America). His draft, the result of long protracted labours, while finally not accepted, was still later used as a model for the Civil Codes of Argentina and Uruguay. During the latter half of the 19th century three other unsuccessful attempts were made to produce a Brazilian Civil Code, the Republic succeeding to the task after the over-

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[1] In Europe there is, however, a newer code in point of time than the Brazilian: this is the *Codex Juris Canonici*, the codification of the Roman Catholic Church, which went into effect in 1918: see Sherman, *Roman Law in the Modern World*², sec. 230, footnote 21 (this and subsequent references herein are to the Second Edition, published by the New Haven Law Book Co., of New Haven, Conn.)

[2] The Code of Commerce is still in force, although it has since suffered numerous amendments. A law for its entire revision and the preparation of a new code was passed in 1911, but as yet no Brazilian congressional action has been taken upon the drafts submitted.

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throw of the Empire in 1889. Finally, in January, 1899, the eminent and versatile jurist Clovis Bevilaqua was commissioned to draft a Civil Code: in November of the same year Bevilaqua submitted his draft with an excellent report. Then followed a fifteen years' consideration and examination of Bevilaqua's draft by Congressional committees, various jurists, judges, faculties of law, and prominent public men; the outcome was the Civil Code in its present form, which was enacted as law in 1916, to go into effect January 1st, 1917. Thus was swept away the venerable and chaotic motley conglomeration of disorderly, redundant, confused, and contradictory Brazilian private law, which was based on the old Portuguese law inherited from the mother country at the time of the separation from Portugal in 1822, the sources of the then Portuguese law being a mixture of mediæval Portuguese and Spanish law, Canon law and Roman law.

The New Civil Code of Brazil, a very recent and able expression of scientific codification, is a living refutation of the erroneous belief that a republic cannot codify its law,—to do so necessitates a monarchical form of government. Moreover, the Brazilian Civil Code of 1917, like the Swiss Civil Code of 1912, is a living witness of the truth that even a federated republic can codify its private law.

The Brazilian law of sale is found in two codes: the Civil Code and the Commercial Code.[3] The principal source of authority is the Civil Code.

Sale is defined as follows:

"By the contract of purchase and sale, one of the contracting parties obligates himself to transfer the ownership of a certain thing, and the other, to pay him a certain price in money."[4]

[3] In Continental-European and Latin-American law the boundary between the Civil and Commercial Codes is as follows: The Civil Code refers "to that part of the private law of a country which is applied to the non-commercial relations between individuals," while the Commercial Code or Code of Commerce "regulates commercial transactions as such, the laws of business, bankruptcy, and the courts dealing with these subjects": Sherman, *Roman Law in the Modern World*,[2] vol. I., secs. 256-257. Obregón, in his *Latin-American Commercial Law* (New York, 1921), pp. 370-371, states in detail when the contract of sale is commercial or mercantile and when it is civil or non-mercantile.

[4] *Civil Code*, 1122 (Wheless' English translation, which is purposely

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This Brazilian law definition of sale manifestly connotes a Roman law origin.[5]

But is the sale of something not belonging to the seller valid? The Brazilian law recognizes the validity of such a contract.[6] The Chilean law is the same.[7] This rule of Roman law origin is, however, not followed in Argentine law, which holds such a contract of sale to be voidable,—thus adopting the French law rule.[8]

The Brazilian law permits ordinarily the sale of things not in existence, but *in futuro*.[9] Argentine law and Chilean law are the same.[10] Brazilian law permits conditional as well as unconditional sales.[11]

Earnest is allowable.[12] Unless there is a stipulation to the contrary, earnest is regarded as part payment of the purchase price.[13] The law of England and the law of the United States are the same.[14] Brazilian law permits, however, the parties to a sale to stipulate for a rescission of the sale by returning the earnest,[15] and thus holds a middle position between Argentine law (which prohibits rescission of a sale by returning the earnest), and Chilean law (which, reiterating the Roman, the French, the Spanish, and the Italian law, permits such a rescission).[16]

In Brazilian law the contract of sale is perfected when the price is settled.[17] Argentine law and Chilean

quoted in order to call attention to his most excellent and scholarly work *The Civil Code of Brazil, translated*, published 1920, by the Thomas Law Book Co., of St. Louis, Mo., and adopted as one of the "Foreign Code Series" of the Comparative Law Bureau of the American Bar Association.

[5] See Sherman, *Id.*, Vol. II., sec. 780, for the Roman law definition of sale.

[6] *Civil Code*, 1117.

[7] *Civil Code* of Chile, 1815.

[8] *Civil Code* of Argentina, 1363; for references to other Modern Codes, see Sherman, *Id.*, sec. 780, footnotes 11-12.

[9] *Civil Code*, 1117.

[10] *Civil Code* of Argentina, 1361; Chile, 1813.

[11] *Civil Code*, 114-115 *et seq.*, 1125, 1145.

[12] *Civil Code*, 1094.

[13] *Civil Code*, 1095.

[14] See Sherman, *Id.*, Vol. II., sec. 782.

[15] *Civil Code*, 1095.

[16] *Commercial Code* of Argentina, 475; *Civil Code* of Chile, 1803; Sherman, *Id.*, Vol. 11., sec. 782.

[17] *Civil Code*, 1126.

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law are the same.[18] But a sale made subject to trial or sample is not perfected, in Brazilian law, until the purchaser has found the thing or things satisfactory;[19] and a sale by weight or measure is not perfected until the thing or things have been weighed or measured;[20] and as to these above mentioned matters the Argentine law and Chilean law are the same.[21]

Brazilian law—in harmony with all other modern law as well as with Roman law—provides that the price must be certain or definitely fixed, permits the price to be fixed by a third person, and forbids the leaving of the price to be determined by one of the contracting parties.[22]

According to Brazilian law, the effect of a sale on the thing sold is to immediately transfer the ownership thereof to the buyer,—no delivery of the thing is required (except in the case of transferring real rights upon movable things: then delivery is essential).[23] As to the general part of this rule just mentioned, Brazilian law is the same as the Anglo-American, French and Italian, and contrary to the Roman;[24] as to the exception to the rule just mentioned, Brazilian law is the same as the Roman, Spanish, Argentine and Chilean.[25]

Before delivery, the risks of the thing sold belong ordinarily to the seller;[26] but risks and injuries occurring in counting, marking or setting apart things, which are commonly thus received and have been already placed at the disposal of the buyer, belong to the buyer.[27] Before delivery, the advantages of the thing sold belong to the buyer;[28] this familiar rule of

[18] *Civil Code* of Argentina, 1357, 1383, 1386; Chile, 1801.
[19] *Civil Code*, 1135, 1144.
[20] *Civil Code*, 1127, 1136, 1144.
[21] *Civil Code* of Argentina, 1370, 1376; Chile, 1821-1823.
[22] *Civil Code* of Brazil, 1123-1125; Argentina, 1383, 1389, 1357, 1385; Chile, 1808, 1809. See Sherman, *Roman Law in the Modern World*, Vol. II., sec. 785.
[23] *Civil Code*, 868, 620, 675.
[24] Sherman, *Id.*, Vol. II., sec. 786, footnotes 34, 36, 38.
[25] Sherman, *Id.*, See also *Civil Code* of Argentina, 611; Chile, 1817.
[26] *Civil Code*, 1127.
[27] *Id.*
[28] *Civil Code*, 868.

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Roman law origin is also the same in Anglo-American, Chilean, French and Italian law.[29]

When delivery is made, Brazilian law requires that the seller must deliver, together with its fruits collected at the time of delivery, the thing sold at the time and place agreed upon to the person mentioned in the contract of sale.[30] Moreover, the seller must warrant the buyer's peaceful possession of the thing sold—that is, the seller must compensate the buyer if the latter was dispossessed by a third person.[31] This implied warranty of the buyer's quiet enjoyment is known as warranty against "eviction"; the origin of the rule and of the name itself comes from Roman law;[32] and this doctrine of eviction is found also in Argentine, Chilean, and other Latin-American as well as all Continental-European law.[33]

The last, and perhaps the most important, of the seller's obligations in Brazilian law is his implied warranty of the thing sold to be free from latent defects or secret faults — frequently termed "redhibitory vices."[34] This implied warranty of quality, which is of Roman law origin,[35] exists to-day in all modern law except the English and American common law.[36] The caveat venditor of Brazil and other admittedly civil law countries in Latin-America and Continental Europe is far more equitable and just than the harsh caveat emptor of the English and American common law.[37]

Brazilian law provides that, in cases of breach of

[29] *Civil Code* of Chile, 1816, 1829, 1830; Sherman, *Roman Law in the Modern World*, Vol. II., sec. 787.

[30] *Civil Code*, 1128, 868; *Commercial Code*, 199.

[31] *Civil Code*, 1107 *et seq.* But this liability of the seller may be increased, diminished, or even excluded by a special agreement thereto.

[32] Sherman, *Id.*, sec. 789, footnotes 48-49.

[33] *Civil Code* of Argentina, 1448, 2792; Chile, 1838-1856; Sherman, *Id.*, sec. 789, footnotes 50-51.

[34] *Civil Code*, 1101 *et seq.* The word "redhibitory" comes from the Roman "*actio redhibitoria*": Sherman, *Id.*

[35] Sherman, *Id.*, Vol. II., sec. 790.

[36] *Id.*

[37] But there is now a tendency in the law of Great Britain and the United States to approach the Roman rule of caveat venditor: Sherman, *Id.*

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the seller's implied warranty of quality, the buyer may elect to sue either for an annulment of the contract of sale or for a reduction in the price;[38] this provision, also of Roman law origin, is found in Argentine, Chilean, and other Latin-American as well as Continental-European law.[39]

The obligations of the buyer, in Brazilian law, are as follows: (1) He must pay the agreed price of the thing bought,[40] and, if he fails to do so, he is liable for interest;[41] (2) he must receive the delivery of the thing purchased.[42] These obligations exist in other modern law, and form a part of the influence of Roman law in the modern world.[43]

[38] *Civil Code*, 1101-1105; *Commercial Code*, 206.

[39] *Civil Code* of Argentina, 2208-2209; Chile, 1860; Sherman, *Roman Law in the Modern World*, Vol. II., sec. 790.

[40] *Civil Code*, 1122.

[41] *Civil Code*, 1064.

[42] *Commercial Code*, 204-205; see also Obregón, *Latin-American Commercial Law*, pp. 387 *et seq.*

[43] Described in Sherman, *Id.*, Vol. II., sec. 791.

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PROBLEMS AHEAD FOR COURTS AND LAWYERS.

By Sherman L. Whipple.

As citizens we are interested vitally in all the problems governmental, social, industrial, and economic. But as lawyers we are especially interested in those which have to do with maintaining the supremacy of law and with continuance of the orderly administration of justice. It is our special task to deal with that spirit of unrest and disorder and defiance of law which has been observed in certain quarters with anxiety and a certain measure of alarm. It is scarcely too much to say that the preservation of society and of our governmental institutions—indeed, our safety as a nation—depend in very large measure upon the ability of our courts to administer justice according to the highest standards, and to maintain public confidence.

It is well, therefore, especially in these critical days, to pause in our busy lives to take account of the general situation, to find our bearings, to see whether we, as lawyers, are working along right lines, and whether our judicial system is ready and fit for what is ahead of it.

We cannot ignore the fact that our courts and our judicial system have been under criticism for some time. Some of the criticisms have been special and directed to particular features, and some of them have been merely a part of the general criticism which in recent years has been directed against most of our institutions. The last quarter century has been an era of question, of criticism, of proposed reform, of destruction of the old, and creation of the new. A spirit of popular unrest has pervaded our entire social and governmental structure. No existing thing or institution escaped its general challenge, and it was but natural that our courts and system of administer-

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ing justice should have come under fire. The criticisms at the outset, at least, were largely general. They represented a general dissatisfaction with the administration of justice, rather than criticisms of specific things. Their notable characteristic was the emphasis and often the bitterness of the expression of popular disapproval.

But this is not true of all the criticisms which were uttered. Many came from sources so authoritative and were so calmly and clearly thought out and expressed, that they made a distinct impression upon those concerned in the administration of justice. It is not too much to say that the emphasis of popular disapproval was such as to cause a genuine alarm; for no criticism is so serious or alarming as the criticism of a nation's administration of justice.

While criticism has by no means disappeared, it has obviously abated, in a measure at least, and has been for some time much less emphatic in its expression. The reason for this is not quite clear. It is undoubtedly due, in part at least, to the fact that the courts, both the judges and the lawyers, have been responsive to public opinion and have heeded criticisms where they had a real and just basis. There can be no doubt that many of the things which have been heretofore the basis of popular criticism have been in large measure corrected, and that our system of administration of justice is, though slowly and conservatively, yet surely, approaching higher standards, and meeting more distinctly with popular approval. But without doubt, the abatement or suspension of popular criticism has been chiefly due to the fact that the minds of men have been diverted and absorbed by the great happenings of the World War and by the problems which the war has left us.

Whether popular criticism will revive when conditions are again normal it is impossible to predict; but whether it be due to revive or not, it is well for us, as lawyers, as officers of the court, and as those chiefly having to do with the system of administration of

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justice, to consider carefully whether just causes of criticism still remain—and if so, to see whether we may not reform them ourselves, without the spur of popular criticism to stimulate our attention.

There was one criticism directed at our judicial system which was carefully thought out, fairly and candidly discussed and endorsed by distinguished men. That was the charge that our courts were usurping authority; that they were encroaching upon and dominating both legislatures and executives; that the judges were assuming to make law, and, by the exercise of a power to declare legislation unconstitutional, defeating laws which the legislature enacted; and that the things which they were doing were in the interest of a class and against the true public interests.

It was in this connection and during these discussions that the term "judge-made" law first came into common use, as designating the laws which were supposed to be made by the judges or by the courts, rather than by the legislature; and the term "judicial veto" as applied to the decisions of the courts declaring invalid laws enacted by the legislature on the ground that these laws violated the term of the Constitution.

This charge deserves careful and fair consideration. It aroused public attention and interest, and has met with a fair measure of public approval. It was endorsed by Theodore Roosevelt. We have not forgotten the drastic remedies which were seriously proposed in this connection. The recall of judicial decisions—probably because its significance was so little understood—was at first hailed in certain quarters with great delight. Naturally every disappointed litigant favoured it; for before it was clearly comprehended there were those who believed that the doctrine meant that every decision of every court that failed to meet with popular approval might be recalled and nullified by popular vote. It was some time before the proposal was popularly understood to apply only

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to those decisions of courts of last resort which were essentially political.

It was in this same connection that the proposal was made that the new doctrine of recall of public officers should be applied to judges whose decisions might not meet with popular approval. It was also urged that all judges be selected by popular election rather than by appointment, and that easy methods be provided for impeachment, in order that the courts and the judges might thus be made amenable and answerable to the popular will.

Because this charge against our political system has aroused such intense interest, both popular and in legal circles, and because I believe its discussion is likely to be the subject of political controversy in the immediate future, I believe it worthy of our consideration now.

The bald pronouncement that courts actually make law, or that they veto laws enacted by the legislature, came as a distinct surprise to the public, and measurably so even to the profession. In the discussion and criticisms to which I have just referred, it was hailed as a new discovery—and an important one. It was implied in the expressions of popular criticism and disapproval, if not definitely charged, that this procedure of the courts was a matter of recent origin; that it was a new usurpation of power, attended with a sinister purpose to destroy that balance in the exercise of powers between the executive, the legislative and judicial departments upon which our system of government is supposed to rest so securely. It was plausibly asserted, and easily believed that the nullification by the courts of statutes represented a defiance of the people's will, and that thereby the courts were assuming to over-ride the legislature and overthrow the laws which the people themselves had made or authorized, and substitute therefor those of the court's making, in which the people had no hand.

The courts were unfortunate in their defenders. While those who made charges did not distinctly formu-

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late them, those who attempted the defence of the court took a false position. They asserted that the judges did not make law; and they restated in support of the proposition that hoary legal fiction that the courts only declared what they found the law to be and interpreted it. They asserted that the judges really did not veto legislation or declare it invalid, but merely decided that certain enactments of the legislature did not accord with the fundamental law or compact of the Constitution.

These assertions were unwarranted; the very fact that they could not be supported greatly heartened those who attacked the exercise of these powers by the courts.

The assertion that the judges make law and in effect veto laws made by the legislature is true. We, as lawyers, know that the courts are not only doing it constantly, but that they have been doing it for years.

The question therefore is not, whether the courts have been doing these things, but whether they ought to continue to do them; whether the interests of the public are best subserved by the courts continuing the exercise of these functions, which, on the face of it, appear to be an encroachment on the domain of legislatures, and a usurpation by the judiciary of functions enabling it to dominate the legislative and executive branches of the government.

As to the law-making power of the courts: The fact is, of course, that the courts are constantly making law, and have been doing so for centuries. The law which controls our daily action, which comes most intimately into the lives of the people in their every-day intercourse, is substantially all law which was made in judicial decisions and never enacted by legislatures. "Judge-made" law means nothing but our common law—the very inheritance upon which our judicial system may be said to rest.

Just how or when judges first began to make law by their decisions, or, in other words, just what is the

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exact origin of the common law, no one can now say. Its history is lost in the mists which surround and envelop its beginnings. It first emerged in history in the records of reporters of decisions, whose reports and writings mark an era of growth and development which extends from Glanvil and Bracton, and Britton and Fleta, through Littleton and Coke, and Blackstone and Kent, to these modern days of a multitude of reporters of the decisions of almost a multitude of courts.

The common law has, indeed, been defined as a collection of maxims and customs existing from "time whereof the memory of man runneth not to the contrary." But these maxims and customs of a simple and primitive people became established as law only when they received the sanction of judicial opinion and decision, and thus become recorded and established as rules of action laid down by a superior authority to which the subject people thereafter were bound to conform.

As was said by Blackstone in his Vinerian lectures to the gentlemen of Oxford University in his description of the origin of the laws of England—

> "And thus much for the first ground and chief corner stone of the laws of England, which is general, immemorial custom or common law, from time to time declared in the decisions of the courts of justice, which decisions are preserved among our public records, explained in our courts and digested for general use in the authoritative writings of the venerable sages of the law."

None of what is strictly our common law ever originated in a legislature. It rests for its authority upon judicial decisions. It is "judge-made" law. It is in this very point that our own system of law differs from others. Most if not all other systems are founded upon the outgivings of lawgivers, and rest for their authority upon the edicts of a supreme and lawmaking ruler, or spring from a compact, or covenant or code, adopted by a legislative body assembled for the purpose, or proclaimed by imperial decree.

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The common law alone resting upon judicial decision was created without either imperial edict or legislative enactment.

The making of law by judges, therefore, is the essence of the English and American system of law-making and the administration of justice. When critics criticise law as "judge-made" they criticise our common law—they criticize the foundation of our judicial system.

To change would be to change our system—to change or abolish that common law, the growth of centuries, the pride of English-speaking people.

Ought we thus to change or modify our system? What are the reasons, if any, for such action?

At the outset it must be conceded, I think, that our system is not perfect—that it has its defects. Let us consider them.

The most serious disadvantage of our system, as it seems to me, is the uncertainty of the law. A client wants to know what the law is before he acts, to guide his action. He consults a lawyer; he expects to have him give a clear, definite, simple and explicit statement of the law. He is entitled to have such a statement and there ought, of course, to be some place where it can be found.

But under our system, if it be a case of novel impression, if the exact point involved has not been decided by the court, neither his lawyer nor anyone else can tell him what the law is. He can only guess. He can cite decisions which, as precedents, bear upon the question; but he is still uncertain. He may give a learned opinion, filled with citations from cases, but at the end he in effect says, "The law may be so and so, and it may be the other way." No one can tell until the court has spoken.

The judges cannot be consulted in advance. If the client is to proceed, he must take his risk. The Court will tell him whether he was right or wrong after he has gone ahead and when the opinion may be of little or no use to him.

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So, if the client proceeds with a transaction and later consults his lawyer to see whether he has proceeded rightly, he finds his lawyer in the same uncertainty. The lawyer has an opinion, but he is by no means sure that he is right. He thinks perhaps the client is right—or perhaps he is wrong. The client finds that his opponent has consulted a lawyer who is in the same state of uncertainty as to the law. That lawyer gives an opinion in favour of his own client. But both of them agree that neither can be sure what the law is until the court decides the question by litigation which may be protracted and is pretty sure to be expensive.

So there is under our system in a case at least of novel impression no simple and certain way of ascertaining what the law really is, or whether one has actually violated some rule of law.

That this defect in our system is not fanciful or of unusual occurrence is shown by the vast amount of litigation with which our appellate courts have to deal. This litigation occurs largely because the lawyers on opposite sides do not know what the law is, and differ in their opinions as to what the court is likely to declare it to be. Each lawyer is confident in his own opinion, and in his belief that the precedents sustain him. But of course in every case one or the other of the lawyers is wrong, and it takes a trial in court, and perhaps successive appeals, to show what the law is.

But the uncertainty does not end with the difference in the opinion of the lawyers; the presiding judge may rule one way or the other; but the appellate tribunal often in turn reverses the presiding justice; while another appellate court may again reverse the decision of the last court. While in the court of last resort, what the law actually is may be determined by the opinion and decision of a majority only of the judges, a vigorous dissent of a minority of

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the court accentuating the uncertainty of the law in its final declaration.

Another and scarcely less serious defect is the cost of ascertaining the law. No lawyer can state to a client promptly and easily an opinion upon which the client may act, even with reasonable safety, except regarding simple and elementary principles. There is nowhere that a lawyer can find a concise, certain, and simple statement of law. He must institute a laborious search of precedents. It may take days of investigation, running back into decisions rendered centuries ago. With all the aids which we receive from digests and encyclopedias, yet the task of rendering an opinion upon which a client may depend is laborious for the attorney and expensive for the client.

But even thus, after he has paid for his opinion, the client is not assured of his position. He may still be obliged to go through litigation in a series of courts, only to find that the opinion of his opponent's lawyer, and not that of his own, is the correct one. To be sure the suitor has the satisfaction of knowing that he has established his particular point of law as a guide to his fellow citizens for all future time. But this satisfaction must be slight as compared with the enormous loss which he has suffered because he could not find out with certainty what the law was.

I do not hesitate to say that it is a reflection upon the administration of justice that one who seeks to ascertain what the law is, and to obey the law, should, as an individual, support the enormous cost of determining what the law is; while the community, which is benefited by knowing the law, bears a comparatively small proportion of the expense.

It is obvious corollary of the proposition to which I have called attention, that the uncertainty of the law and difficulty and expense of determining it, give an enormous advantage to the rich litigant, over the one of limited means. A man with a cause perfectly just may be, and frequently is, unable to undertake the expense even of such an examination of the law as is

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necessary in these times to secure an opinion as to his rights; to say nothing of the tremendous expenses of litigation as a cause goes from court to court in its onward progress toward ultimate decision.

This situation lends colour to the criticism and assertion which are frequently heard, that justice has its price; that the decision goes to those who can afford expensive lawyers to aid in securing it; and that justice to the impecunious suitor, even if he gets his case into court, is not of the same quality as that to the suitor possessed of means to employ those who are skilled in the law, and who can pay the expenses for the time required in research of cases and precedents which may bear upon the controversy.

Such a situation places a premium upon the skill and industry of lawyers; for obviously those lawyers who are most skillful and industrious are more likely to win the decision than those who have not the skill or are unwilling to make the sacrifices.

But justice should be without price, open alike to rich and poor. It should depend upon truth and the merit of the cause, and not upon whether one litigant or another may be able to secure the abler lawyer.

But in fairness it should be said that the effect of the conditions to which I have referred is largely mitigated by the action of the courts and our profession; for if it can be possibly done, a just cause is not permitted to fail by reason of the poverty of the litigant.

But that just causes do fail, are never brought into court, or even to the attention of a lawyer, is nevertheless a fact, and this is due to things inherent in our judicial system that are beyond the power of the judges or the lawyers to control.

Another criticism often heard is that the exercise of a law-making power by the court is inconsistent with our theory of government and an encroachment on the functions of the legislature. Superficially, this is so. It is quite true that our Constitution provides that the

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legislature shall enact laws, the judiciary interpret and the executive execute them.

But however much the courts may have encroached upon the legislature, there is this to be said: they have done exactly this same thing from the very beginnings of our judicial system, centuries before our written Constitution was adopted, and before the theory of our government had been established or even thought of. The law-making powers exercised by our courts are far older than any provision of the Constitution defining the making of law as the legislature's exclusive function; and it is too obvious to permit of debate that our Constitution must be construed in the light of this history.

But after all, this encroachment upon the legislative function is more superficial than substantial. For it is always within the power of the legislature to alter the law which is made by a decision of the court. The legislature is thus actually supreme in the field of legislation and the laws framed and declared by the court are always subject to legislative revision.

I shall not attempt an analysis or definition of all the advantages of this system of ours, which has stood the test of centuries; but to my mind its great merit lies in the fact that the laws which the courts declare are formulated by experts. They are the products of minds trained in the law, educated in the study of the law, experienced in its practice. They are formulated by men who concentrate their attention and energy solely upon the determination of what rule of action will be for the benefit of the community as a whole unaffected by any other influence.

The result has been the creation of a harmonious and consistent body of law, free from the influence of ignorant prejudice, not to say corruption which sometimes has found expression in legislative enactments.

While, therefore, conceding that our system is not without defects, its merits far outweigh them. The Common Law, the "judge-made" law, is too firmly fixed as the basis of our judicial system ever to be

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disturbed. It must continue to stand as the distinguishing feature of the administration of justice in English-speaking nations. It is not merely a collection or body of maxims and customs which can be laid aside at will. It is a scientific development of a system of law which is part and parcel of the spirit of Anglo-Saxon institutions. To its upbuilding have been contributed in succeeding centuries the products of the greatest judicial minds of English-speaking people. It will continue to stand as a memorial of great lawyers and as the lasting foundation of English and American jurisprudence.

Turning now to the other branch of our discussion ought our courts to continue to annul the enactments of our legislature?

This question presents a unique feature not only of our judicial but governmental structure. Among no other great people is any such power exercised by courts. In England, from whom we inherit our jurisprudence, it would be unthinkable that courts should declare invalid an Act of Parliament. In the English governmental system Parliament is supreme. Its enactments are subject to no revision. The function of courts is solely to interpret the law.

But England has no written Constitution; and it is because of our system of written Constitutions that the courts exercise this power.

When we adopted a Constitution it became our supreme law. The executive, the legislative and the judiciary were subordinated to act in conformity with its provisions. The legislature was authorized to enact only such laws as were in accord with the Constitution.

But how and by whom is to be determined what was and what was not in accord with the Constitution?

Could the executive assume authority to determine whether what he himself did was or was not in accord with the Constitution's provisions? Had the executive the authority to say whether a legislative enactment was or was not in accord with the Constitution?

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Could he say whether a decision of the court was or was not constitutional?

On the other hand, could the legislature determine that some action of the executive was unconstitutional and bring him to book therefor? Or could the legislature direct the action of the court in accordance with its own views as to whether the decisions of the court were or were not in accord with the Constitution?

Or was the authority to interpret the Constitution and the action of the executive and legislature in respect thereof invested in the courts?

Strangely enough, the original constitutions which we adopted contained no provision on the subject.

When the question really arose, the whole theory of a written Constitution was in peril. It was manifest that if the executive were to declare what was and what was not constitutional, either in his own acts or those of the legislature and judiciary, he would become a dictator; for the power to interpret the Constitution carried the power to destroy it.

It was equally evident that if the legislature should decide whether its own enactments were constitutional or not it would place the legislature above the Constitution and render its restrictions nugatory.

In this crisis, and under circumstances of grave doubt and uncertainty, the courts of the nation have assumed a power which no other court of any civilized nation had ever before assumed—the power to determine whether a legislative enactment was binding as law, or was wholly nugatory and void. I have said the courts assumed the power. It might better be said that this duty was thrust upon the court. It was the only tribunal in whose decisions on the subject the general public would acquiesce; and without some tribunal to determine these questions, government under written Constitution was a failure.

So it has come about that the public has for years acquiesced in the assumption of this power by the court. Acquiescence, however, has not been unanimous. It was Andrew Jackson who said when this

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power was first assumed by the Supreme Court of the United States:—

"John Marshall has made his decision. Now let him enforce it."

It is the exercise of this power in recent years that has caused the severest criticism of the court.

The reason is obvious. The function performed is not judicial but legislative and political. The decision is not of a controversy between individuals—as a decision of the court usually is — but rather the declaration of a policy in respect of social, industrial or governmental questions, upon which there may be, and frequently is, acute controversy between large parties or bodies of men. The court, therefore, in nullifying legislation which frequently has been accomplished in the heat of political controversy, naturally incurs the bitter resentment of the defeated party.

Naturally the offended faction immediately raises the question whether the court has authority to exercise such a power, and if so, whether it is wise that such authority be continued.

It is, of course, frequently asserted that the action of the court is not legislative in character—that the court does not make these policy-forming decisions on considerations that influence a legislature in its enactments or an executive in approval of a measure. But this plainly is not so. One has only to read these decisions to realize that they rest upon political or social rather than judicial considerations. Most are majority decisions, and so far as legal principles are concerned, could as well be decided for as against validity. They are decided plainly according to the belief of a majority of the justice as to whether a declaration of validity or invalidity is in the public interest.

It is evident that this power of invalidating the acts of the legislature places the court in a position completely to dominate, if they so will, the legislative and executive branches. It is a tremendous power, and the growing frequency of its exercise has given just cause for anxiety. This is especially felt in those

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isolated cases where single judges, in terms but scantily respectful, have declared invalid a law passed after extended discussion in response to a clear public mandate.

It is certainly unfortunate that our courts are called upon to deal with and determine questions involving class prejudices and hatreds or political or social questions which are involved in dispute. But on the other hand, it is a duty the performance of which by some tribunal was essential under our form of constitutional government, and the courts could not escape it.

However, much as we may regret the results to the court from the exercise of this power, the way out of the situation is not easy to see. A change would require a reform of our constitutions so radical that the remedy might prove worse than the thing it sought to correct. After all, it must be said that the courts highest in authority and reputation have exercised this power sparingly and with reluctance. They have usually resolved doubts in favour of the validity of legislation. Although not responsible directly to the people, they have on the whole heeded the popular view in recognition of the fact that in every democracy a majority must ultimately control.

While the question is perplexing and will undoubtedly be further considered and discussed, apparently for the present at least, we must look forward to the spirit which the courts have already shown as our safeguard in the exercise of legislative powers by the judiciary.

SHERMAN L. WHIPPLE.

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SHAKESPEARE'S LAW.

By Richard Bentley.

A recent book by Sir George Greenwood has cast a few more rays of light upon the controversy concerning Shakespeare's legal attainments. But, unfortunately, that author does not see fit to go further. He merely suggests it as desirable that the question be re-opened *ab initio* by one "learned not only in the law of to-day, but in the law, and the practice of the law, civil, criminal, and ecclesiastical, as known to the lawyers of Elizabethan times." It would be difficult nowadays to find a man who had all the necessary qualifications and who at the same time had the leisure to devote to the task. Until such a man appears, we must content ourselves with the numerous inadequate books which have been written on the subject. Some of these books insist that Shakespeare actually was a lawyer; some vociferously deny it; but most of them occupy some middle ground. It is interesting to find that of these books the most comprehensive show in general a lamentable lack of competence in the author, while those written by the most competent authors are usually mere pamphlets. It seems that the comprehensiveness of each book varies inversely as the liability and qualifications of its author.

Three of the books, each representing a type, will be considered in what follows. A brief comment upon them will show the trend of the controversy, and the few remarks offered in conclusion will point out what is necessary to a satisfactory solution of the problem.

"Law in Shakespeare," by Edward J. White, occupies a prominent place on the bookshelves of many cultured lawyers, and for that reason one wishes it were more worthy. It tells us more of its author than it does of the "myriad-minded" one. The reader is forced to the conclusion that the writer is labouring under the stress of a great emotion to convince us of

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Shakespeare's genius, but that he is struggling against the handicap of an inability to appreciate the literary and dramatic qualities of Shakespeare's works. He seems suddenly to have become alive to the poet's greatness and to be seeking a justification for his rude awakening. Literary background may not be essential in a lawyer, but the lack of it on one who attempts to discuss Shakespeare seems hardly forgivable. When we read a reference to "rare old Ben" and see his name spelled "Johnson," we may entertain some doubts as to the author's intimacy with his subject. We may even infer that he thought he was referring to the Gargantuan lexicographer. What a shock we should receive if upon opening Milton our astonished eyes should read:

> "Then to the well-trod stage anon
> If Johnson's learned sock be on,
> Or sweetest Shakespeare, Fancy's child,
> Warble his native wood-notes wild."

In supporting his feeble contention that it was William Shakespeare and not Francis Bacon who wrote the works, Mr. White cites the Droeshout portrait in the 1623 folio, and the verses of Ben Jonson (spelling it "Johnson") referring thereto. He tells us that these "certainly furnished a title deed to this edition of the plays in his favour." But though he puts the Baconian theory in issue, Mr. White seems never to have read the little pamphlet, "Who Wrote Shakespeare?" which uses this very portrait and these very verses—and not unplausibly—to deny Shakespeare's authorship, for he offers nothing in rebuttal. This part of his argument shows lack of thorough grounding; the rest of it seems almost puerile.

But why is it necessary to bring in the Baconian controversy? No one doubts that Francis Bacon had a legal education. If William Shakespeare did not write "Shakespeare's Works," does anyone care whether or not he had a legal education? In other words, the question Mr. White and the others are considering is: "Did William Shakespeare, assuming his

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authorship of "Shakespeare's Works," have a legal education? That this is actually the question before them is evidenced by the fact that they go to the works to answer the question.

In the body of the book Mr. White cites practically every expression in Shakespeare's works which could possibly have legal significance. But he cites many others besides. In fact, he cites so many of the others that it detracts from the force of those which are really legally significant. Mr. White was industrious, but industry is not always profitable. For example, we cannot but admire the industry of the gentleman, whoever he was, who discovered that if one looks at the Forty-sixth Psalm of the King James Version, and takes the forty-sixth word from the beginning, and the forty-sixth word from the end (exclusive of "Selah") he will find the words "shake" and "spear." But to what conclusion does that assist us? Mr. White might suggest that King James, succeeding Elizabeth in 1603, and being mindful of the worth of the Bard of Avon, hit upon this method as being an appropriate way of erecting a memorial to him. Mr. White might even have us believe that King James himself did the translating!

Examples follow of some of the supposed allusions to the law given to us by Mr. White:

> "Twelfth Night:" Act 1, Scene 5: . . . "he says he'll stand at your door like a sheriff's post and be supporter to a bench, but he'll speak with you."

After telling us about sheriff's posts Mr. White continues—

> "As such ministerial officers" (sheriffs) "supported the judgment seat or 'bench' by executing the decrees of the Court, it is probable that this line means the post used by the sheriff for this purpose" (posting notices) "carried out and helped execute the decrees of the Court, and in this manner 'supported' the bench."

So anxious is Mr. White to show this to be an illusion to things legal that he seems to overlook the fact that sheriff's posts were commonly used in England as supports for ordinary benches. The sheriff's post was

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situated in a place of rendezvous of the populace, and it was quite common to find benches there, as one does in a park nowadays. The post itself often formed one leg of such a bench.

"Twelfth Night:" Act 1, Scene 3: "By my troth Sir Toby, you must come in earlier o' nights; your cousin, my lady, takes great exceptions to your ill hours."

Of course, this may show that Shakespeare was thinking of "exceptions" in the legal sense, as Mr. White contends. It seems hardly convincing, for the word then, as now, was in the common parlance of those who knew no law.

Mr. White refers to the word "moiety" occurring in "The Merchant of Venice," Act IV., Scene 1, as being a legal allusion. But this also fails to convince us when we realize that in the sixteenth and early seventeenth century the word was commonly used by laymen to mean simply "half."

In short, although it would be well-nigh impossible to discover a legal allusion which Mr. White's scissors have failed to find, the book has little merit as proof of Shakespeare's legal attainments. Mr. White has let in too much chaff with the wheat. He seems to have written under an emotion which is blindly trying to find facts to support it. He actually tries so hard that the reader is made to think that he feels the facts do not justify his position. He "doth protest too much, methinks!" The author's original writing brings the book down to the level of mediocrity. Without this it might be classed as a remarkable compilation of all the possible legal allusions in Shakespeare. But just as it was Samuel Johnson's own emotions which made his dictionary valueless as a dictionary (for example, his definition of patriotism as "a refuge from traitors") so Mr. White's own emotions have detracted from the value of his book. If the reader confine himself merely to the quotations in Mr. White's book, excluding all the author's original writing, he will be "plucking the grass to know where sits the wind," and for this purpose only the book is valuable.

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Very different is Lord Campbell's treatment of the subject. In response to a request from Mr. Payne-Collier he wrote to that gentleman a letter in which he voices his opinion of the controversy. He opens with a résumé of Shakespeare's life, showing it to be quite consistent with the facts as we have them that Shakespeare may have had unusual opportunities for acquiring legal information. He advocates the theory —but not in Mr. White's categorical way—that Shakespeare was an attorney's clerk in Stratford in the interval between the years 1579 and 1592. This period is a blank so far as our facts are concerned, and has been accounted for by various theories, perhaps the most popular of which is that he was employed as a butcher's assistant. Lord Campbell does not assert his theory, but logically, and apparently even with reluctance, shows it to be the most probable one. He does, however, assert that "no sensible man can possibly imagine" that Shakespeare spent the years from 1579 to 1586 as a butcher's apprentice. All we actually know of the period is that he married Anne Hathaway in Stratford, and that three children, Susanna, Hamnet, and Judith, were born. It is supposed that Shakespeare and his wife lived apart after 1586, and that subsequent to that date he was in London, but these assumptions are based upon pure inference. Lord Campbell backs up the attorney's clerk theory by citing a letter of Thomas Nash in a prefix to Robert Greene's "Menaphon." This letter refers to "Noverint" and "Hamlet." Lord Campbell shows us that "Noverint" is the first word in the Latin original of "Know all men by these presents," and deduces that this name is applied to a drawer of deeds. And since Nash attributes the authorship of "Hamlet" to "Noverint," Lord Campbell shows that this drawer of deeds was in all probability Shakespeare.

The one startling statement Lord Campbell makes is that Shakespeare "wrote a beautiful and business-

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like hand." Now I challenge anyone who has seen Shakespeare's handwriting to vouch for that statement. Let who will say that it is beautiful, I deny that it is businesslike!!

Lord Campbell gives us fewer quotations from the works than does Mr. White. But those he gives us are convincing.

One of the most significant remarks he makes is his failure to remark at all upon the "no jot of blood" quibble in "The Merchant of Venice." This point has been one of the rocks upon which have broken the storms of controversy. Those who claim Shakespeare did have a legal education have tried to explain it away; those denying his legal training have based their contentions largely on this point. Lord Campbell ignores it as not worthy of comment!

Mr. White chooses feeble illustrations from "Twelfth Night"; Lord Campbell says frankly that he finds no evidence in that play.

In Part 2 of "Henry IV.," Act 1, Scene 2, Lord Chief Justice Gascoigne holds an interview with Falstaff in which he reprimands him for his lawlessness. This passage has been cited to show Shakespeare's ignorance of law; but Lord Campbell shows that such a proceeding was "quite in course" at that time. Thus does Lord Campbell turn aside a weapon that has been wielded against the attorney's apprentice theory. In fact, he makes of it one of his strongest arguments in favour of that theory.

In "King Lear," Act III., Scene 1, Gloucester says of Edgar:—

> " . . . Besides his picture
> I will send far and near, that all the kingdom
> May have due note of him . . . "

Lord Campbell's comment upon this is interesting. He says:

> "One would suppose that photography, by which this mode of catching criminals is now practised, had been invented in the reign of King Lear."

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But Lord Campbell does not suggest that it is equally remarkable that the use of this method should have occurred to Shakespeare, living in the pre-photographic age.

The Chief Justice cites us from "Hamlet" the passage relating to the "impress of shipwrights," and states that this passage has even been quoted as an authority upon the legality of pressing into the service of the Royal Navy shipwrights as well as common seamen. The fact that Shakespeare has been cited as an authority is indicative of the popular belief in his legal attainments.

But Lord Campbell is skeptical. He declares that the *onus probandi* is upon Payne-Collier to establish the attorney's apprentice theory. There is, he says, much evidence for it, and little against it. But that evidence is not, he intimates, so overwhelming that all reasonable minds would agree upon it.

Lord Campbell refers to Malone's notes on Shakespeare showing a familiarity with the contributions to Shakespeareana made by those who have studied Shakespeare from other than the legal point of view. That such familiarity is highly desirable in writing on the legal side of the question is obvious. It is in such matters that Mr. White's book falls down. Had he been familiar with the literary notes on Shakespeare he could never have stumbled into the absurdity, for instance, in making the sheriff's post "support the judgment seat." Lord Campbell's familiarity with Roman Law (shown, for example, in his remark that Shakespeare "here mistakes the duties of Tribune for those of Praetor") is an additional factor which qualifies him to write on the subject. He has given us a book which is interesting and scholarly, and which has, in addition, the unique distinction, so far as the present writer is aware, of being the only one among all the books that is thoroughly accurate.

"Shakespeare's Law," by Sir George Greenwood, is a rehearing of mooted questions rather than an

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original compilation. The Book shows literary background and scholarship, but its author misquotes Shakespeare twice, which fact leaves us some doubt as to his accuracy. To be sure, the misquotations are ones commonly made, but that is hardly a defence. A man like Lord Campbell could never had misquoted "I am Sir Oracle and when I speak let no dog bark." Nor would the Chief Justice ever have fallen into the common inaccuracy of making "assurance doubly sure." He would have correctly quoted "ope my lips" instead of "speak," for undoubtedly when he used a quotation he made "assurance double sure" and looked it up.

Sir George takes up Mr. Charles Allen's chapter on "Bad Law in Shakespeare" in that writer's "Notes on the Bacon-Shakespeare Question," and points out very convincingly that what is there alleged to be bad law is, as a matter of fact, very accurate and good law from the Elizabethan point of view. His disposal of the various points raised by Mr. Allen need not be discussed here at length. An example or two will suffice.

Mr. Allen accuses Shakespeare of ignorance of the law in "All's Well That Ends Well," when the king compels his ward, Count Bertram, to marry a poor physician's daughter. He declares that the king could not lawfully compel a ward to marry below his station, and thus sammarily disposes of the point. Sir George quotes from the play itself to point out the error in Mr. Allen's contention. He shows that the king, in fact, does exactly what the law empowers him to do. He raises the social position of the physician's daughter through his power to ennoble commoners, and thus Count Bertram marries one who has been made his social equal "as't were born so."

Sir George's disposal of another point is glorious. Mr. Allen had urged that "you and your heirs forever" is not a proper legal expression as it occurs in

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Antony's speech over Caesar's body. Antony reads Caesar's will and tells the populace—

> "Moreover he hath left you all his walks
> His private arbours and new-planted orchards,
> On this side Tiber; he hath left them you
> And to your heirs forever.

Mr. Allen urged that since this was a dedication of lands to the public the words are inappropriate as implying individual ownership. The only way to do justice to Sir George's disposal of this point is to quote him:

> "It is difficult to speak with due restraint of such criticism as this. "Their inappropriateness! Good heavens! Whether or not Shakespeare was a lawyer, he was certainly a dramatist, and the best of all dramatists. And could anybody with a spark of dramatic instinct, anybody but a hide-bound pedant, fail to see how splendidly those words 'and to your heirs forever' ring out for the ears of the populace? They may be 'inappropriate' for an indenture, but Antony was no lawyer, and he was not drafting a deed. Neither was Shakespeare, whether lawyer or not, such a poor dramatist as to make a great orator, speaking to rouse the passions of a Roman mob, talk in the technical language of a conveyancer."

This common-sense view of the controversy is convincing. One can wish that Sir George had both the inclination and the time to open the controversy, as he himself suggests it should be opened, *ab initio*. We would than have a version submitted by a sound lawyer, a literateur, and, most of all, a dramatic connoisseur.

In dealing with this subject we must remember three things:

First: In spite of the fact that Shakespeare's works are practically the only evidence we have, we must remember that he did not write them with the idea that they were to be used as evidence.

Second: He was writing plays and poems, and writing them in all probability for his daily bread. He had to sell them, and in order to sell them he had to popularize them. Is it reasonable to suppose that legal language was in Shakespeare's day, any more

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than it is now, a source of literary or dramatic enjoyment to the *hoi polloi*?

Third: It is hardly reasonable to suppose that we can gain conclusive evidence concerning the legal side of a man's nature from writings produced by that man when the literary and dramatic sides were expressing themselves with compelling genius.

There are, undoubtedly, in the works many expressions which would be unlikely to occur to one unfamiliar with legal matters; there are a few expressions, no doubt, which *prima facie* show ignorance of the law. The first kind are numerous; the second scarce. It seems that the more light we cast upon the second, the more quickly they disappear, but that does not settle the question. Were the first an accident? Were the second written in sport? These questions can never be answered categorically, and a failure to recognize that fact has caused many of the absurdities with which the controversy is fraught. We have a question upon which all reasonable minds do not agree, and our only way to settle it is to decide it according to what seems to us individually the preponderance of the evidence.

The controversy is at best an academic one. It is interesting to us merely because Shakespeare was pre-eminent, not in the legal, but in the literary and dramatic fields. Whether, then, we decide that he had a legal education—and this seems to the writer the most reasonable conclusion—or whether he had none, we lose the significance of the controversy when we allow it to eclipse our just appreciation of those qualities wherein the Bard of Avon has never been surpassed.

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NOTABLE CASES NOTATED.

Corporation Law—Capacity v. *Power.*

The case of *Waterous Engine Company* v. *Town of Capreol,* determined before the Appellate Division of the Supreme Court of Ontario in April last, is of immense value in solving the enigma presented to the practising lawyer by the amendments added to the Companies Acts of the various Provinces in 1916 conferring upon corporate Companies the capacity of Common Law Corporations, or the same capacity as if they had been incorporated by Royal Letters Patent under the Great Seal.

The case is not yet formally reported. But the facts receive a clear statement and the Law a lucid expounding in the Reasons for Judgment in the case rendered by the Hon. Mr. Justice Hodgins. They harmonise with the Judgment of the Court of Appeal of Saskatchewan in *Bank of Commerce* v. *Cudmore,* (1922) W. W. R. Vol. 1, p. 287. Gradually it seems we are getting out of the woods. Here are Mr. Justice Hodgins' reasons for Judgment:—

"The question in this case is as to the liability of the appellants on a promissory note given by them on account of the purchase money of a fire engine. This note has found its way into the hands of the respondents, after having been deposited with a chartered bank by them as security for their indebtedness. There was no municipal by-law authorizing either the purchase of this fire engine or the making of the note sued upon.

"Subject to two matters, which I will refer to later on, the case of *MacKay* v. *The City of Toronto,*[1] and the Canadian authority referred to in it, seems to settle the question that a municipal corporation cannot buy a fire engine unless the purchase is sanctioned by by-law. The judgment in that case says, page 213:

[1] 1920 A. C. 208.

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"This corporation is not a creature of charter and as such endowed with capacity by the common law, but it is the pure creation of a statute. It may be that the effect of the Interpretation Act of Ontario which gives to every corporation the power to contract, makes this power a general feature of its statutory equipment. But the section cannot affect the prohibition imposed by the Municipal Act of the exercise of its distinctive powers otherwise than by by-law under seal."

"The question now arises whether the provisions of 6 George V., chapter 35, section 6, or section 47 of the Bills of Exchange Act, operate so as to avoid the effect of that decision. The 1916 Statute says:

"Every corporation or company heretofore or hereafter created . . . by or under any general or special Act of this Legislature shall, unless otherwise expressly declared in the Act or instrument creating it, have and be deemed from its incorporation to have had the general capacity which the common law ordinarily attaches to corporations created by charter."

"Section 47 of the Bills of Exchange Act is as follows:—

"Capacity to incur liability as a party to a bill is co-extensive with capacity to contract; provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor or endorser, of a bill, unless it is competent to do so under the law for the time being in force relating to such corporation."

"The word 'capacity' is used in both of these sections. In one, the capacity is that which the common law ordinarily attaches to corporations created by charter, and in the other it is capacity to incur liability. A company incorporated by Royal Charter cannot set up that its contract is void as beyond the capacity of the company. Per Blackburn, J., in *Riche* v. *Ashbury Railway Co.*,[2] and also per Lord Haldane in *Bonanza Creek, etc., Co.* v. *Rex.*[3] The Ontario Statute purports to give this 'plenary capacity with which the common law endows the chartered company.'

"It is perhaps to be regretted that the notion of the prerogative right to create corporations by Royal Charter and its consequences was introduced into Canadian Company law.

[2] L. R. 9 Ex. 224.
[3] 1916, 1 A. C. 566, at p. 584.

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"But as it has been, there is some necessity for ascertaining exactly what is the meaning of 'capacity' so as to get a clear idea as to how far the quality denoted by that expression implies authority, without more, to do acts and incur liabilities, or whether it is not really a state or existence with only potential capabilities which require some further or other authority to prescribe how they are to be brought into action, and where they can be exercised.

"It is comparatively easy to understand what capacity means as applied to the individual. Every man has capacity to marry; an insane man is incapable of any legal act. General restrictions upon all men do not create incapacity in any. A law forbidding marriage with a deceased's wife sister or one requiring all marriages to be solemnized in a particular way do not take away capacity. They prevent the legal exercise of the capacity in question.

"Is then, what is called 'capacity' arising out of the creation of a legal entity known as a corporation the same as the capacity of an individual, and how does incapacity arise? A Dominion Company with capacity to hold land may have its power to do so governed and restrained by the Provincial Mortmain Act: 'If the company can so acquire and hold it (*i.e.* under license), the act of incorporation gives it capacity to do so.' *Colonial Bldg. Society* v. *Attorney-General*,[4] *Great West Saddlery Co.* v. *Rex*.[5]

"Lord Haldane in the *John Deere Case*,[6] speaks of the status and corporate capacity of a Dominion Company as "carrying with them powers conferred by the Parliament of Canada,' while in the *Bonanza Case*,[7] the same learned jurist makes the statement that although a local Legislature can create capacity to receive certain powers from others, it cannot grant those powers itself. Apparently, in his view, the grant of capacity carries with it,

[4] (1883), 9 App. Cas. 157, 166.
[5] 2 App. Cas. 91.
[6] 1915, App. Cas. 330, at p. 341.
[7] (1916), 1 App. Cas. 566, at p. 585.

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so far as power to exercise that capacity is concerned, only that to which the constitutional rights of the granting authority extend. Yet it can constitute what it cannot endow. This is an anomaly. A proper definition of the term in question would clarify the situation, for it seems remarkable that a Provincial Company can be invested with a capacity which must remain sterile till some outside authority gives it power to act outside the Province, and at the same time the Province is unable to attach to that capacity any disability in the charter which brings it into existence.

"It is therefore most necessary to ascertain exactly the extent to which the creating body is empowered to determine in regard to Provincial objects, whether the 'capacity' which it can confer is to be more extensive than, or only co-extensive with, its power to impose conditions or limitations on the corporations it creates.

"The *Bonanza Case,* p. 583-4, inferentially recognizes the validity of statutory restrictions as contrasted with those written in the charter. And the question then arises, in view of the 1916 Statute, whether the limitations in the letters patent or charter are to be treated as if they were such as the King has directed in a Royal Charter shall be observed. These Royal restrictions are treated as directory only and not as diminishing the capacity of the corporation to do acts contrary to them. This view is founded upon *Sutton's Hospital Case,*[8] which is treated as a binding authority in *British South Africa Co.* v. *DeBeers Consolidated Mines Limited*[9] and other cases. It must therefore be accepted as settled law notwithstanding that Lord Coke is accused of interpolating his own ideas into the judgments which he reported. Indeed, an examination of that case indicates that the decision is really an illustration of the rule that the Crown cannot derogate from its own grant. But the fact that a corporation created by Royal charter may not assert that a contract is void as beyond its capacity, merely

[8] (1613), 10 Co. Rep. 1, a.
[9] (1910), 1 Ch. 354.

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because of a condition inserted in the Charter, is quite a different thing from saying that, granted plenary capacity, the contract is valid although it fails to comply with limitations or forms inserted in or prescribed by its letters patent issued under the authority of an Act of the Local Legislature. The Act of 1916, which adds the important section to those already in the Ontario Joint Stock Company's Act, may, of course, mean that every company, which under that section is to be deemed to have the capacity of a common law company, does in fact derive its existence and capacity from the Act of the Sovereign if its Charter or Letters Patent is sealed with the Great Seal, or it may be construed as endowing with plenary capacity corporations who derive their existence from the words of the regulating statute and are governed nevertheless by its provisions and restrictions.

"These very important questions arise but are not conclusively dealt with in the interesting judgments in *Edwards* v. *Blackmore*.[10] What is needed is a close analysis of the Ontario Joint Stock Companies Act, as amended in 1916, so as to determine whether the limitations expressed in the Companies Act, or in the letters patent, are to be looked at as if inserted in a common law charter, or are limitations to be regarded as statutory restrictions, referred to by Lord Haldane in the *Bonanza Case,* at 583/4, thus: 'In the case of a company created by charter the doctrine of *ultra vires* has no real application, in *the absence of Statutory restriction added to what is written in the charter.*'

"Fortunately this case does not need a complete solution of these problems. I cannot, as at present advised, assent to the view that the section added in 1916 to the Companies Act was intended to include, or did include, notwithstanding its wide terms, municipal corporations, or that if it did, it destroyed the statutory restrictions on their powers, which have existed for so long a time in Canada, and can continue to

[10] (1918), 42 O. L. R.

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exist consistently with the most ample capacity otherwise. I think the Mackay case must be regarded as decisive on this point, although it deals with the Municipal Act prior to the Statute of 1916.

"With regard to section 47 of the Bills of Exchange Act, even if the words 'capacity to incur liability' were read as including power to do so, it is only co-extensive with the power to contract, and that power is, by the Mackay case, said to be overridden by the prohibition imposed by the Municipal Act (p. 213). Besides, the concluding words of that section expressly recognize the disability created by statutory restrictions. I agree with my brother Maclaren that there was no holder for value through which the respondents can sustain their claim.

"The result is that, in my opinion, no liability was imposed on the appellants by the promissory note produced. The appeal should be allowed."

Bona Vacantia—Royalties—Ejusdem Generis Rule of Construction—Rights of Provinces.

Momentous is the value and effect of the recent decision of the Supreme Court of Canada (reversing a judgment of the Exchequer Court), *Ex rel. Attorney-General for Canada* v. *Attorney-General for British Columbia and Rithet.*[11] This decision established the Constitutional Law that *bona vacantia* belong to the Crown in right of the Provinces in which they arise, and not to the Crown in right of the Dominion.

Perhaps the commonest case of *bona vacantia* is the personal estate of a person dying intestate without heirs. The expression, however, applies to ownerless goods generally, and the present case concerned the personal property in British Columbia of a defunct English corporation. ("The Shareholders, if any remain, of the dissolved company have made no claim to these moneys, and should they ever do so, nothing in the judgment to be rendered should stand in the way of justice being done to them.[12]

[11] (1922), 3 W. W. R. 269.
[12] Per Mignault, J., p. 280.

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The common law rule was that ownerless goods belonged to the finder; *quod nullius est fit occupantis.* But to prevent strife and contention the rule was long ago changed, and the Crown and not the first finder became entitled to goods which had no owner.[13]

By an Imperial Statute of 1852[14] casual revenues of the Crown arising within a colony, other than *droits* of the Crown and *droits* of Admiralty,[15] were capable of appropriation by the Colony.

Coming to the B. N. A. Act, we find in sec. 102 provision for the creation of the Consolidated Revenue Fund of the Dominion. All duties and revenues over which the Legislatures of the uniting Provinces had power of appropriation were to constitute that Fund, except such duties and revenues as were reserved to the Provinces, or raised by them under the powers conferred by the Act. The right to casual revenues such as escheat and *bona vacantia* was, therefore, transferred to the Dominion, unless expressly reserved to the Provinces under the Act.

Section 109 reserves to the Provinces "all lands, mines, minerals, and royalties belonging to the several Provinces . . . at the Union." Does the word "royalties" include the casual revenue of *bona vacantia?*

It was clear that the right to *bona vacantia* was one of the *jura regalia,* and that *jura regalia* and royalties were synonymous expressions.[16] The question was, therefore, whether or not the word "royalties" occurring in sec. 109 was to be given its primary and natural sense. The Province contended for its ordinary meaning; the Dominion for a restricted meaning, limited to royalties arising out of lands, mines, and minerals. The Statute says: "all lands, mines, minerals, and royalties belonging to the several Provinces . . . at the Union." The argument for

[13] Halsbury's Laws of England, vol. 7, p. 209; Stephen's Commentaries, 15th ed., Vol. II., p. 607.
[14] 15-16 Vict. ch. 39.
[15] *E.g.*, Naval prize, etc.
[16] *Dyke* v. *Walford*, 5 Moo. P. C. 434.

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the Dominion was that the *ejusdem generis* rule should be applied so as to restrict the meaning of "royalties." This argument was rejected by the majority of the Court, and Mr. Justice Anglin may be quoted as follows:—[17]

I find great difficulty in appreciating the force of the argument in favour of restricting the meaning of the word royalties to such *jura regalia* as are associated with "lands, mines (or) minerals." This is not the ordinary case of generic words following particular and specific words. "Royalties" is neither more nor less a generic word than "lands, mines (or) minerals." The fact is that the term "royalties" denotes a class of subjects differing entirely from "lands, mines (and) minerals. No common genus embraces them."

Without belittling the rule of construction invoked on behalf of the respondent—*noscitur a sociis*—care must always be taken that its application does not defeat the true intention of the Legislature (*Hawke* v. *Dunn*, (1897) 1 Q. B. 579, at p. 586. 66 L. J. Q. B. 364), and the cardinal rule that

> An Act of Parliament is to be construed according to the ordinary meaning of the words in the English language, as applied to the subject-matter, unless there is some other very strong ground, derived from the context or reason, why it should not be construed. (*Hornsey Local Board* v. *Monarch Inv't Bldg. Soc.*, 24 Q. B. D. I., at p. 5, 59 L. J. Q. B. 105),

should not be disregarded.

I share, to some extent, the view expressed by Rigby, L.J., in *Smelting Co. of Australia* v. *Commissioner of Inland Revenue*, (1897) 1 Q. B. 175, at p. 182, 66 L. J. Q. B. 137:

> The rule of construction which is called the *ejusdem generis* doctrine or sometimes the doctrine "*noscitur a sociis*" is one which, I think, ought to be applied with great caution; because it implies a departure from the natural meaning of words, in order to give them a meaning which may or may not have been the intention of the Legislature.

Were we to accede to the argument of Mr. Newcombe, we would, I fear, put on the ordinary meaning of "royalties" a restriction that Parliament did not intend. Indeed, Parliament has already limited that word by the qualification, "belonging to the several provinces . . . at the Union." Why should the Court superadd another? It may be that from other provisions of the B. N. A. Act other limitations upon the signification of "royalties" should be deduced. For instance, the rights asserted by the Dominion to legislate concerning *bona confiscata*, deodands and royal fish, may be well founded; but, saving such possible exceptions, with profound respect, neither in "the subject nor in the context" do

[17] Pages 279-80.

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I find adequate reason for giving to the word "royalties" in sec. 109 other than its primary and natural meaning. I think it includes the *jus regale* to *bona vacantia*. It would, indeed, present a curious incongruity if escheats should be included in, but *bona vacantia* excluded from, the royalties granted to the provinces.

As already stated, the Court allowed the appeal and gave judgment holding that the *bona vacantia* in question belonged to the Province. The Chief Justice dissented.

It had been held by the Privy Council many years ago that land in Ontario escheats to the Province and not to the Dominion.[18] It has also been held by the Privy Council that precious metals found in British Columbia belonged to the Province, not as "mines" or "minerals," and not as an incident of "lands," but as "royalties."[19] In both cases the Judicial Committee had to consider the meaning of the word "royalties" in sec. 109, but in neither case did they go farther in elucidating its meaning than was strictly necessary to decide the matter before them.

The Supreme Court of Canada a few years ago decided a case relating to escheat of land in the Province of Alberta.[20] That Province (and Saskatchewan is in the same position) was carved out of the North West Territories in 1905, and admitted to the Union "as if it had been one of the Provinces originally united," except in so far as its position is varied under The Alberta Act.[21] By sec. 21 the Parliament of Canada purported to withhold "Crown lands, mines and minerals and royalties incident thereto." It was, therefore, held that the royalty of escheat, being a royalty incident to land, was vested in the Dominion.

The reader who desires to pursue the subject further is referred to Dr. Scott's article on Escheat and *Bona Vacantia* in XXXVII. C. L. T., p. 764. But

[18] *Atty.-Gen. for Ontario* v. *Mercer*, 8 App. Cas. 767; 52 L. J. P. C. 84.

[19] *Precious Metals Case*, 14 App. Cas. 295; 58 L. J. P. C. 88.

[20] *Trusts & Guarantee Co.* v. *The King* (1916), 54 S. C. R. 107.

[21] Statutes of Canada 1905, ch. 3, sec. 3.

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the reader should bear in mind when reading Dr. Scott's article or when any distinction is attempted to be drawn in regard to these Rights of Escheat and *Bona Vacantia* between the original Provinces of Canada and the Provinces carved out of the North West Territory, that the authority of the Parliament of Canada to make any discrimination between the old and the new Provinces of the Dominion, or to withhold the *dominium* over their land from the new Provinces, or to vary or derogate from the rights of Provinces as established by the B. N. A. Act,—has been impugned by articles of Mr. Bram Thompson, in the C. L. T., Vol. 39, p. 417-494 and, since he became the Editor, in Vols. 40, 41 and 42 *ubi:* and the Privy Council has actually given an *obiter dictum* affirmance of his contention that the *dominium* over their Land and Natural Resources is vested in the new Provinces and they cannot be divested of it by any enactment of the Parliament of Canada. *Vide* Privy Council views, C. L. T., Vol. 42, p. 227.

Contempt of Court.

The case of *Dunn* v. *Bevan*[22] was aptly described by Sargant, J., as a "storm in a teacup," and certainly the purport of the actual decision could not have been a matter of any very great difficulty. Nevertheless, it is just because this class of case does not often arise that it is so interesting to search for parallels and probe the history of the matter. Lord Hardwicke, in *Roach* v. *Garvan*,[23] enumerates the different classes of contempt, and the soundness of his classification has never seriously been called in question. Three classes are known to him, namely, scandalizing the Court itself, abusing parties who are concerned in causes before the Court and prejudicing mankind against persons before the cause is heard. But the present case cannot be brought into line with any of these. A comment on a case either is, or is not, a contempt of

[22] (1922), 1 Ch. 276; 91 L. J. Ch. 299.
[23] (1742), 2 Atk. 469.

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Court; it has been plainly decided in *Metzler* v. *Gounod*[24] and *Dallas* v. *Ledger*[25] that it is no contempt to make comments on a case where a decision has actually been given, even if the time within which a motion for a new trial may be made has not yet expired. In the present case, however, there was the additional circumstance that the plaintiffs had insinuated, in their newspaper, that the defendants had not been altogether cleared of the imputation of fraud. This part of the case is met by a dictum of Lord Hardwicke in *Roach* v. *Garvan* (*supra*): "To be sure, Mr. Solicitor-General has put it upon the right footing, that notwithstanding this should be a libel yet, unless it is a contempt of the Court, I have no cognizance of it; for whether it is a libel against the public or private persons, the only method is to proceed at law." The law on the subject is, indeed, quite plain; the gist of the matter, as laid down in cases like *In re Bahama Islands*[26] and *R.* v. *O'Dogherty*,[27] is the interference with the course of justice merely by making comments on the decision in a particular case, when nothing more is left to be tried? Two questions, however, arise out of the present case; the first is, would an injunction have issued to restrain the circulation of a libel? It is submitted that it would, had the defendants claimed it; instead of this, they elected to apply for an injunction to restrain a civil contempt. This procedure seems startling; in the older case, the claim had been for punishment, or sequestration, for a criminal contempt. The second question is, why was no reference made to *Scott* v. *Scott*,[28] where is to be found the best summary of the case-law on this subject that has been given for a long time? The only explanation is that *Scott* v. *Scott* was a case tried in camera. But nevertheless it presents an interesting and exhaustive commentary upon the right of parties

[24] (1874), 30 L. T. 264.
[25] (1868), 4 T. L. R. 432.
[26] (1893), A. C. 138.
[27] (1848), 5 Cox C. C. 348.
[28] (1913), A. C. 417.

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to disclose matters involved in a case after the proceedings have terminated. In considering the two admitted exceptions of proceedings affecting lunatics or wards of Court, it is essential to remember that these proceedings are in part at least non-judicial. It was a mere accident that the Crown delegated the administration of the estate of the lunatic to the Lord Chancellor, and there is reason to believe that the jurisdiction over the person and property of an infant arose, or acquired importance, after the Court of Wards ceased to exist; see *Oxenden* v. *Lord Compton*.[29] Sargant, J., in *Dunn* v. *Bevan*, referred to "a report which amounts to scandalizing the Court by making attacks upon the Judge who presided at the trial." Nearly half a century has elapsed since the vilification of the Chief Justice who had presided at the trial of *Reg.* v. *Castro* occurred. There the indictment had been removed into the Court of Queen's Bench, and that Court could have called upon one offender to answer for his contemptuous words, but the Judges adopted the more dignified course of treating the attacks as unworthy of serious attention. Before *Scott* v. *Scott* had been decided, the principle which is now clearly established had been recognized in *Tallerman* v. *Dowsing Radiant Heat Co.*,[30] for it was made a term of the judgment, to which the defendant consented, that the plaintiffs should abstain from comment. Although comments where the action has not been finally disposed of have always been regarded in a more serious light than where the proceedings have terminated, there is at least one case in which a party has been allowed to warn a section of the public in general terms that certain goods could not be dealt with by reason of an injunction having been granted; *Powis* v. *Hunter*.[31] There seems to be no objection to a bare statement of the state of the record, but anything in the nature of comment is pro-

[29] (1793), 2 Ves. jun. 69; 2 R. R. 131.
[30] (1900), 1 Ch. 1; 69 L. J. Ch. 46.
[31] (1832), 2 L. J. Ch. 31; 37 R. R. 296.

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hibited; *Felkin* v. *Herbert*,[32] *J. & P. Coats* v. *Chadwick*.[33] Thus a reference to allegations in a pleading, whether for the purpose of refuting them or not, would be obnoxious as involving *ex parte* statements: *Coleman* v. *West Hartlepool Ry.*,[34] *Kitcat* v. *Sharp*.[35] It must also be remembered that the publication of scandalous, blasphemous, or indecent matter may involve the publisher in a penal liability: *Rex* v. *Mary Carlile*,[36] *Steele* v. *Brannan*.[37] But there a substantive and independent offence is committed.

B. T.

BOOK REVIEWS.

Handbook on Companies with Appendix of Forms. By William K. Fraser, assisted by Hugh W. MacDonnell, both of the Toronto Bar. Toronto: The Carswell Company, Limited.

This is a timely and exceedingly useful book to the Practitioner engaged in the formation or liquidation of Companies or in advising upon the multifarious requirements of their administration so as to comply with the Companies Act. Its authorship could not well have emanated from a more reliable source; for Mr. Fraser is the joint Author of Company Law of Canada published some years ago by Mr. Justice Masten and himself, and he is, besides, the Author of Canadian Company Forms and Precedents. Every lawyer in Canada concerned with Company Law or the incorporation of Companies knows the value of these two really able works, especially the great work of Masten and Fraser on the Company Law of Canada. This last Book is a splendid addition, and truly constitutes a series with the precedent Works. A unity and harmony run through them all. But this last Book is designed not so much for the Lawyer as for Shareholders, Directors, Bondholders, Officials,

[32] (1863), 32 L. J. Ch. 294; noted 143 R. R. 356.
[33] (1894), 1 Ch. 347; 63 L. J. Ch. 328.
[34] (1860), 8 W. R. 734; 116 R. R. 951.
[35] (1892), 52 L. J. Ch. 134.
[36] (1819), 3 B. & C. 167; 22 R. R. 338.
[37] (1872), L. R. 7 C. P. 261; 41 L. J. M. C. 85.

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Brokers, Authorized Trustees and Liquidators. It is a Work, however, which the Lawyer will find of inestimable value in giving him in brief and ready form suggestions and guidance in almost every matter of a Company's affairs presented to him. It is, in truth, a daily reference guide-book; and it makes no pretence at discussing the complexities and difficulties of Company Law in general, for these find ample exposition in the other Works named, especially in that of Masten and Fraser. There is, therefore, absent from this Book the usual long array of Cases, as well as the multitudinous foot-notes which not infrequently obscure rather than illuminate the text to which they are appended, leaving the reader's mind in a more or less state of bewilderment.

In this Work everything dealt with—and everything necessary to the formation or incorporation, organization, and administration of Companies is dealt with—is clear and stated in precise language. The Prospectus, for instance, in Chap. III., Promoters, Underwriters, etc., in Chap. IV., Private Companies, in Chap. V., Directors in Chap. IX., Supplementary Letters Patent in Chap. XVI., Blue-Sky Laws in Chap. XX., Taxation in Chap. XXII., and Winding up in Chap. XXIV.—all are admirably expounded.

There is a very valuable Table of Fees with an Appendix of Forms, and the Index is worthy of all praise for its accuracy and completeness.

Let the reader remember this is not merely an Ontario Work though produced by two Ontario Barristers. It deals with Company Law throughout the Dominion and with the Companies formed under the Laws of the Legislatures of the various Provinces. These Laws differ in details, here and there, but the differences are noted for the reader's benefit with truly the skill of unerring experts.

We congratulate the Authors on the perfectness of their Work and the Publishers also upon theirs; and we commend the Book to every person responsibly concerned in Company Law or in Company administration. B. T.

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EDITORIAL.

Sources of Law and its Making in Canada.

Sir Henry Maine in one of his admirable works—I think it is his Ancient Law—tells us the historical stages of legal development; and so uniform have been the World's phenomena that he is able with confidence to generalize and place the stages in this order: Usages, Customs, Codes, Juridical Pronouncements, and Legislation.

To the mind of the superficial observer it will at once occur that the British Nation, or rather the English speaking Peoples, for I include the United States, form exceptions to this general rule; for none of them have had anything like the Codes of the ancient World, both in Europe and Asia; and it is asserted that this phenomenal exception forms a rule of its own, namely, that these Peoples or Nations, having developed their jurisprudence and their juristic conceptions commensurately with their advancing Civilization, the existence of a Code at a definite stage is not one of the essentials of progress. This is, however, a sophism; for when we examine the phenomenon we find that the conclusion is based upon a hypothesis which is false in the essence, though it is true on the surface.

It is true that the Law of England—the Law with which all the British Colonies not only on this Continent but throughout the World were invested—did

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not develop from the Customs period of Law directly into the Legislative period, but intermediately it infused that expanding Jurisprudence called Equity which the Courts of Chancery assumed the jurisdiction to dispense concurrently with or as a palliative of the rigidity of the customary or Common Law. The consequence of this was that two distinct and well defined bodies of Law existed contemporaneously and were dispensed concurrently in England—the Common Law and Equity. But where did this Equity originate? Did the Judges or dispensers of it invent it? Assuredly not. They got its radical and cardinal principles in the Roman Law—in the Code, Pandects and Institutes of Justinian, in the *Edicts* of the Praetors, in the *Responsa Prudentum* of the Juris-consults, in the yet more recondite works of the Great Roman Jurists, and in the still more prolific sources of all refined jurisprudence—the Philosophic Works of Socrates and other great Writers who adorned the age of Hellenic splendour.

The Jurists of Britain therefore, without preparing a Code, virtually adopted the Roman Law in its most developed and refined form and thus the Law of England had all the advantages of the Code stage of development. Both the Common Law and Equity branches of England's jurisprudence were enriched and expanded by this adoption; and in time they came to be regarded as one system and divided only by the jurisdiction of the dispensing authority—one being under the control of the Common Law and the other of the Chancery Courts: And ever since the Judicature Act of 1873 they have been completely fused and blended together and administered as one Law. The old line of demarcation has been effaced; and our Law to-day is either *Lex scripta,* the enactments of Legislatures and called Statute Law, or *Lex non scripta* and called Common Law.

The *Aequitas* or Equity of Roman Law transfused into ours was a great Law Maker. Its influence was transcendent. It was ennobling; for it impregnated

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our Law with the sublime principles of Justice derived originally from the *Lex Naturae* or the simple behests of Truth and the superb theories of secular righteousness. From the Praetors and the *Edictum Perpetuum* it passed to England's Chancellors and found expression in their uncontrolled Judgments for several Centuries. Lord Eldon was about the last of them; and all subsequent Chancellors have been almost entirely confined to expounding or reconciling precedent principles embodied in Judgments of their precursors.

Canada became the inheritor of all this development just as the Old Colonies which were the nucleus of the present United States Nation, had been its inheritors at an earlier period. For both these Countries, before they entered upon their individual development, the period of Judge-made Law had passed; and each has, since the establishment of the United States as an Independent Nation, developed along quite distinct but nevertheless parallel lines. With the exception of Quebec in Canada and I think one State in the American Union, both these Countries have as their fundamental the Common Law of England—that is the old Customary Law of England enriched and expanded by the later Equity jurisprudence; and each since it became self-governing has, for the development of its Law commensurately with its growth and with the variations in the conditions of life and in the conceptions of the People, had recourse to its Legislative power.

It is pronouncedly fundamental in the American Constitution that the People are the source of all Law; and this is no less true in Canada except that, till she emerges fully as a Nation, she is under certain limitations which are, however, so flimsy that they are ethical rather than real.

Since 1867 the Legislative Power has been divided between the Federal Parliament and the Legislatures of the Provinces. But there is a larger element of Sovereignty in the Province than there is in the Dominion; and when the time comes—as from all appear-

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ances it is coming rapidly—for Canada to emerge as a Full Sovereign Nation, it must be seen to that the Sovereignty is reposed in the entities and not in the Federal Unity. This can only be achieved by adopting a Constitution. The United States have set us an example in this respect which we can neither neglect nor act in opposition to.

There are certain branches of Legislation which should appertain to the Provinces but in the interest of uniformity have been relegated to the Federal Parliament. Some of these relegations are wise and some are, at least, disputable to-day; and in drawing up a Constitution for " Canada a Nation " several of them will have to be either cancelled or curtailed if Canada is to continue to progress. But as I intend at a not distant day to discuss this great problem in Book-Form, I desist from stating anything further here.

Codification ought to be the great work of Legislatures; and both the Dominion Parliament and the Legislatures of the Provinces have done something in their respective spheres in the way of providing fragmentary Codes. Parliament has given us, for instance, a Bill of Exchange Act, which is really a replica of the corresponding English Act. Both are in fact Codifications of the Law Merchant; and the Legislatures have given us a Sale of Goods Act which is a replica of the English Act of 1893. But there is a difference: the English Act was avowedly a Codification of pre-existent Law, whereas the Acts in Canada make no such claim; and in the interpretation many divergences might evolve from this rather puerile variation of the effect of the Legislation in England and in Canada.

Neither the Parliament of Canada nor the Legislatures have made any attempt to codify Corporation or Company Law, though each of them has a certain authority in the incorporation of Companies and in dissolving and winding them up. There is no branch of our Law more in need of Codification or Uniform-

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ity; for though a Dominion Company has a status in every Province and the Company of any Province can acquire a status in every other Province, there are not two of the Companies Acts of this Country identical. Confusion is everywhere owing to this.

Until recently Parliament left untouched two subjects reposed within its Legislative Power—(*a*) Bankruptcy and Insolvency and (*b*) Marriage and Divorce. The latter it still leaves determinedly alone; and it enacted a Bankruptcy Law only when it was forced by an unreckoned event to do so. The event was this: the new Provinces carved out of the North-West Territory succeeded through a decision of the Privy Council in 1919, in maintaining that they had the English Law of Divorce as embodied in the Matrimonial Causes Act, 1857; and not only was it an inevitable corollary of that decision that these Provinces had also the Bankruptcy Law, but the present writer who had raised the Divorce issue in 1917 intimated with no uncertainty of determination, that unless Parliament enacted a Bankruptcy Law for the whole Dominion a test case similar to the test case in regard to Divorce, would be brought from the Western Provinces to the Privy Council. A Dominion-wide Bankruptcy Act was then projected and passed. Large parts of it are copied from the English Act; but where it innovates it is much less efficient; and its Jurisdictional Clauses and the General Rules formulated under it are open at any moment to the charge that they invade Provincial prerogatives or rights. However it was an attempt to do something with a manifest reluctance; and by amendments it may become a beneficial measure in time.

So far its natural supplement—Insolvency Law—has been left untouched; and as I have said a Dominion-wide Law of Marriage and Divorce as yet finds no place on our Statute Books. The Provinces of Manitoba, Saskatchewan and Alberta succeeded, as stated, in getting the English Divorce through a decision of the Privy Council construing certain Statu-

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tory Enactments of the Dominion investing these post-Confederation Provinces with "the Laws of England, Civil and Criminal, as the same existed on the 15th day of July, 1870." The Dominion Parliament never meant to confer Divorce Law under these enactments; and for nearly 40 years they were accepted, even by these Provinces themselves, as excluding Divorce Law till the present writer in the C.L.T. of 1917 stated the converse and the true construction of the Dominion enactment. A test case ensued with the result stated. The Law of Divorce in Canada is, in consequence of Parliament's neglect, in a deplorable state. British Columbia has English Law as of 1858; Manitoba, Saskatchewan and Alberta as of 1870; the Atlantic Provinces have various makeshifts of the English Law as of a still earlier date; Quebec has a system of separation under the Code Napoleon; but Ontario has nothing except recourse to Parliament for Private Bills; and the utter incompetency of Parliament to enact such Bills has so often been demonstrated in the C.L.T., without result, that I disdain any further comment. A day of dreadful reckoning is not far off.

The enactments in the Legislatures are made to meet varied conditions and conceptions of the People in the different Provinces; but there is of course an enormous sub-strata or layer of Civil Rights and of Property Rights which present great opportunities for uniform Legislation for all the Provinces. These opportunities seem not to have been utilized. The three Prairie Provinces are, for instance, almost identical in their conditions and requirements; and yet hardly any Provinces have such Legislative divergences. The Companies Acts, which in no two Provinces are identical, are a conspicuous example; and, as far as I know, no approximation to uniformity has ever been projected or undertaken by the Provinces.

There is now I understand a uniform Insurance measure in course of settlement for enactment by all the Provinces. That at least is a step in the right

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direction but it has been a long time foreshadowed; and, in fact, it is still in the shade.

Generally speaking upon the Legislation which the Provinces actually enact it is impossible to look with equanimity. When first enacted it is crude both in conception and in execution; and no sooner is it on the Statute Book than it is altered, and no sooner altered than it is altered again, so that what is Law in one year is the opposite of Law in the next. The volume of measures enacted each year, however, is enormous considering the population and the very limited character of the conditions. The men who prepare this Legislation for the Provincial Assemblies are not altogether to blame. It is often forced upon them at the last moment, and even after they prepare it, it is altered to such an extent in passing through the House that it is scarcely recognizable. As soon as it emerges its defects and contradictions are manifest to every eye. The next Session it has to be amended; but what of the interim?

Our Legislatures should as a corrective of what I have been stating divide their Sessions into two terms. In the first term all Legislation intended to be passed should be introduced and read the first time, and copies provided for Members of the Legislature and all persons interested in it. There should then be a period for sending in written suggestions for alteration or amendment of the proposed Legislation, and when the second term opens these suggestions having previously been considered by the Government and responsible Law Officers, should be taken up and discussed and voted upon *seriatim*. Alterations should be made in accordance with the vote of the House; and then the whole remitted to the Committee for unification and harmonizing, so that when the Measure came up for final reading it would be seen that it displayed no *ex facie* trace of any divergence. This at least would aid in imparting some kind of permanency to the Legislation of our Provincial

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Legislatures; and would be an enormous advance on the helter-skelter system which now prevails in them.

Permanency of Law is a great ingredient in development. Until the last 50 or 70 years the annual output of Legislation in the Imperial Parliament was very small indeed—much less in volume than that of any of our Provincial Legislatures in Canada to-day. But the Legislation of the Imperial Parliament covered the Empire while the Province is the orbit of Provincial Legislation.

I do believe and suggest, deliberately, that the men responsible for the drafting of the Legislation both in Parliament and in the Legislatures of the Provinces are not conscious of, or at least impressed by, the fact that they are contributing to or retarding the development of the Country according to the virtue and value, or the opposite to these, of the measures submitted for enactment. If this great fact were realized by the Governments which employ Legislative draftsmen, there would be an instant change; expert capacity would replace happy-go-lucky makeshiftery; and instead of one Session correcting the grammatical and other blunders of the preceding one, we should have an annual output of clear and concise enactments of requisite Laws. We would then be permanent Nation-builders and cease to play the game of constructors one year of what in the next year we are demolishers—a game which can never raise the edifice either of the Nation or of anything else.

B. T.

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THE CHOSE IN ACTION: ASSIGNABILITY IN PARTS.

By Bram Thompson, Barrister, Regina.

Few parts of the Common Law have had a more interesting historical development than the Chose in Action, which remains to-day except with respect to some of its incidents—assignability for instance—purely an offspring of the Roman Law conception planted in the Common Law and nurtured and matured through the infused principles of Equity Jurisprudence.

The history of it I do not propose to discuss in any detail, and much less do I propose to precisely define what a Chose in Action really is beyond this: that it is any Right arising *ex contractu* or *ex delicto* which is not capable of reduction into physical possession but is enforceable by some process of Law. I draw no distinction, for the purpose of this Article, between the Right itself and a document or legal instrument which might be merely the evidence of the Right. Both for my present purpose would be Choses in Action.

Under the pure Common Law, the Chose in Action was unassignable. The rule was rigid; but about the beginning of the 18th Century Equity began to recognize the assignment of debts and other contractual Choses in Action, as is evidenced by *Walmstrey* v. *Tanfield* (1628), 1 Ch. Rep. 29, and by *Squib* v. *Wyn* (1717), P. Wms. 378. But this assignment did not pass the legal right. It was only equitable; and did not vest in the assignee any right to sue in his own name. He had to sue in the name of the Assignor —the name of the person to whom the Chose originally belonged by contract. The Common Law Courts quickly followed Equity in this respect; and both the Courts of Law and Equity, even so early as Black-

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stone's day, ceased to regard an Assignment of a Contractual Chose in Action as importing or implying the tainting presumption of Maintenance which could only be rebutted by establishing a vested mutuality of interest between the Assignor and the Assignee anterior to, or at least contemporaneous with, the Assignment. After this development of conception the Assignor of Contractual Choses in Action—debts for instance—simply made the Assignee his Attorney to sue; and the action was brought in the name of the Assignor. In this way, the fiction or delusion that a Chose in Action was unassignable was given the appearance of being preserved while, in fact, the Assignee was securing all the advantage of a legal, valid Assignment. The device, so far as contractual choses were concerned, was a fiction; and as a balustrade to the fiction, the rule against assignability was strictly maintained with respect to Rights of action for Torts both to the Person and Property.

By the Judgments Act of 1838 a species of assignment of certain contractual Choses in Action was devised by authorizing the Sheriff to seize them or the documentary Evidences of them under an Execution; and the Common Law Procedure Act, 1854, devised another species of assignment by authorizing a Plaintiff to attach or Garnishee debts due or payable to a Defendant by a third party. This was tantamount to a compulsory assignment from the Defendant to the Plaintiff of a Contractual Chose in Action the right to which was vested in the Defendant.

It was not, however, until the English Judicature Act, 1873, that Assignment of the Chose in Action was really put upon a legal basis. That Act enacts (Section 25, Subs. 6):—

"Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action of which express notice in writing shall have been given to the Debtor, Trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been

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effectual in Law . . . to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same . . ."

This Act has been adopted in most of the Provinces of Canada with here and there a variation. Some of them omit the word "absolute" and some of them the clause requiring "an express notice in writing to be given to the debtor." But these variations do not affect the main question I desire to discuss.

None of the Acts authorizing the Assignment of a Chose in Action ostensibly or specifically extends to a part of a Chose in Action; and the question has more than once been mooted, and has in fact produced the clashing of judicial opinions, whether or not a part of a Chose in Action can under the Statutory authority stated be assigned in the same way and with the same incidents as the entire Chose in Action.

Having regard to the old Common Law rule of non-assignability, and to the halting device of merely relaxing the rigidity of that rule by a *soi-disant* equitable assignment, it is impossible to import into the reforming Legislation anything that the language does not clearly authorize, warrant or imply. That is a sound rule of construction.

The framers of the Judicature Act and their imitators or followers since in the Legislatures of Canada, in drawing up the clauses authorizing Choses in Action to be assigned so that the Assignee might sue in his own name, must be assumed to have had the question before them of extending the right not only to the legal Chose in Action but to any part thereof. Extension to parts of the Chose in Action was almost a natural corollary of establishing the general power to assign; but the fact that the parts were omitted from the new statutory right shows that the intention was to confine the right to the entire Chose in Action. The restriction of the enactment was in every case deliberate; and I hope to show it

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was wise and just, and that judicial interpretation cannot extend it and should not attempt to do so by what I may call sentimental Equity generated out of the axiom that the whole being equivalent to all its parts, the right which pertains to the whole pertains *pari passu* to every part of it. This is sophistical; and the inference is not either just or logical.

Before discussing cases in both England and Canada where the decisions or *obiter dicta* opinions of the Courts give countenance to both views—that the legislative authority to assign *includes* and that it *excludes* the parts of a Chose in Action—I will state the reasons as they appear to me why the Right to a Chose in Action is not divisible; why a part of a Chose in Action is not assignable and is not within the enabling enactments, either of England or Canada.

To avoid confusion I will consider the case of a specific debt or sum of money payable to an individual person at a definite time under a Contract. The debt or sum payable is an integrity; and, apart from agreement, the Right of the Creditor as well as the obligation of the Debtor are indivisible; and in case of default the Creditor or Payee could only by an action at Law enforce performance of the entire obligation. He could not enforce performance, or sue for the money payable, in parts or by separate actions; for it is the whole and not any part *per se* which is the obligation and the cause of action. This is the Law of Contract; and none of the enactments, either in England or Canada, pretend to alter or vary the Law of Contract.

If, then, the Creditor or Payee has not the right to divide the obligation of his debtor so that he might himself sue for its performance in parts, where is the Law, Statutory or otherwise, which empowers him to do for others what he could not do for himself—to split up the obligation of his Debtor into fragments and, by assignment, to create separate rights of action or Choses in Action of the fragments assigned?

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There is no such Law; and the enabling statutes as to assignability give no sanction to any such radical revolution in the Law of Contract.

The enabling statutes state that a legal Chose in Action can be assigned so as to vest it and the right to sue for it in the name of the Assignee—to assign what the Assignor has; no more and no less; and there assuredly is no authority in any of them to *create* in an Assignee a different right or a higher right than the Assignor himself had. He has not, I repeat, and could not *create* for himself a right to sue piecemeal for his debt or individual contractual Right; and, except by express legislative authority, he cannot, merely by fragmentary assignments, create such a right in others.

That itself would seem to be conclusive as to the interpretation of the Statutes, as they stand, authorizing the Assignment of the Legal Chose in Action. But there is more to be said as to the reason why the right to divide an obligation into fragments has not been conceded by the Legislatures in the past; and should not be conceded by them in the future.

The obligation of a man contracting a debt is to pay it in terms of the Contract. If he fails to perform this, the right of the Payee is to sue for it. It surely would conflict with all conceptions of Justice and with the avowed policy of all Law, if the Creditor on a default being made could sub-divide his debt into a hundred different parts and either sue for each part separately or assign it to another. This would mean the alteration as well as the augmentation of the obligation. Yet this is what could be done if the right to assign a part of a Chose in Action were once established either by an express enactment or by such a Judicial interpretation of the existent Legislation as extended the right of assignment from the whole Chose in Action to its parts.

What an injustice it would be to A owing $2,000 to B to have his debt assigned in particles of $200

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each to 10 different people, each of whom could institute an action and sue him to judgment and execution with all the attendant costs. And suppose he had some defence, set off, or counterclaim in respect of the debt against the original Payee, he might find that in asserting it against the 10 Assignees in the 10 actions he had to defend, he had won in 5 and lost in 5 mainly, perhaps, from the fact that the original Creditor or Payee under the obligation was not a necessary party to the 10 actions of the Assignees.

The Legislatures which enabled the owner of a Chose in Action to assign it, never contemplated any such injustice as this; and they never intended that the obligation of the debtor or performing party should be extended or augmented or multiplied or complicated either by its subdivision into parts or otherwise; but merely that the integral Chose in Action should be assignable and that the Assignee should be an Assignee of the whole and should stand in the same relationship to the Payor, debtor or performing party as the Assignor under the original obligation had stood prior to the Assignment.

What I have said should not be confused with an obligation which provides for its performance in parts —the payment, for instance, of a debt by instalments. As each instalment would be a severable part of the obligation, it would be a separate Chose in Action and assignable as such. In this way a debtor might, under one Contract, have a multiplicity of Creditors and possibly of actions at Law. But this would merely be the result of the relationship established between the parties by the Contract; and it does not really affect the proposition which I have been expounding—that a Chose in Action, being an entire obligation, is not divisible or severable into parts, nor is it assignable in parts as separate and distinct obligations.

Now there have been several cases both in England and Canada on the constructions of the Enactments authorizing the Assignment of the Chose in Action;

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and some of these cases are quoted in text-books as authority for the proposition that the power to assign extends to the parts as well as to the whole of the obligation or Chose in Action.

The four Canadian Cases are:

Wellington v. *Chard,* 22 U.C.C.P. 518.
Hostrawser v. *Robinson,* 23 U.C.C. P. 350.
Dawson v. *Graham,* 41 U.C.Q.B. 532.
John Deere Plow Co., v. *Tweedy,* 5 W.W.R. 1155.

On examination it will be found none of these cases support the claim that the Chose in Action is divisible. The last three cases do not affect the question before me at all, but were concerned solely with the question whether an Assignment was absolute or not; and the first case was a good illustration of the divisibility of an obligation by the parties themselves under the original Contract, so that its parts were severally performable, and as such were distinct Choses in Action and could be separately enforced by the original contracting party entitled to the performance or by his Assignee. Not only that, but the decision, or rather the *ratio decidendi* of it, is entirely in favour of the non-assignability of a part of an integral Chose in Action.

The English Cases are:

Bergman v. *McMillan,* 17 Ch. D. 423.
Brice v. *Bannister* (1878), 3 Q.B.D. 569.
Durham v. *Robertson* (1898), 1 Q.B.D. 765.
Jones v. *Humphries* (1902), 1 K.B. 10.
Skipper v. *Holloway* (1910), 2 K.B. 630.
Foster v. *Baker* (1910), 2 K.B., C.A. 636.

Though these cases were concerned with assignments of parts of Choses in Action, yet all of them except *Brice* v. *Bannister, Skipper* v. *Holloway* and *Foster* v. *Baker,* were determined upon questions which did not involve a decision as to whether a part of a Chose in Action was within Section 25 (6) of the Judicature Act. But they contain, nevertheless, quite a lot of stray *obiter dicta* phrases which give counten-

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ance to the use to which they have been put by text-book writers and commentators who were satisfied with the surface view.

With this remark I pass to the three cases named which really do concern the issue. The last case is the first I should discuss; for, as far as it was possible, it settled the issue, and settled it in favour of the Chose in Action being assignable only as an integrity and not piecemeal. For its illumination I will clear the way by a few words on the other two cases.

Brice v. *Bannister,* the Assignment of £100 out of a larger sum payable under a Contract, was upheld by the Court. The assignment was by way of a letter from the Payee under the Contract to the Payor directing this £100 to be withheld from the Payee and paid to the person named in the letter—the Assignee we will call him. The Payor received this letter but did not act upon it. Nor did he repudiate it; and his silence or passiveness was in fact tantamount to an acceptance of the obligation placed upon him by his Creditor. Moreover it was more in the nature of a Draft than an Assignment. It was, in fact, a draft by a Creditor upon his Debtor in favour of a third party; and retention was tantamount to acceptance. At all events, the Court by a majority upheld the transaction. But Lord Justice Brett dissented, and his reasons have since been accepted and acted upon in *Foster* v. *Baker.*

Skipper v. *Holloway* was the next case. It came before Mr. Justice Darling on circuit at *Nisi Prius;* and he said: "it is impossible to say, in the present state of authorities, there is any express decision on the point. Indeed it was expressly reserved in *Jones* v. *Humphries.*" The point was that A assigned "so much of a debt of £125 due to A, not exceeding £30, as should cover the costs due from A to the Plaintiff Skipper, a firm of Solicitors." Mr. Justice Darling, with the expressions set out, held the assignment was within Section 25 (6) of the Judicature Act. It is

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well-known that decisions of single Judges given at *Nisi Prius* are not regarded as authorities; and therefore when the case of *Foster* v. *Baker* came forward immediately afterwards, the problem was approached *de novo;* and *Skipper* v. *Holloway* was rejected.

Foster v. *Baker* is therefore the last and, so far, the ruling case on the question whether Section 25 (6) of the Judicature Act applies to parts of Choses in Action.

The facts of this case are:

A Judgment had been obtained against the Defendant Baker by one Bowles. Bowles by a Deed assigned to Foster, the Plaintiff, "all the said Judgment debt to the extent of £560. To hold unto the said Foster absolutely." Notice of the assignment was duly given to Baker. Foster obtained leave *ex parte* to issue execution on the Judgment for the amount assigned to him. On a Motion on Notice the Order for the Execution was discharged; and a special issue directed to be argued whether Foster was entitled to issue an execution as he had done. On this issue Mr. Justice Bray said all the cases prior to *Skipper* v. *Holloway* were mere opinions, and that even this case was a *Nisi Prius* decision. I cannot do better than supply his own words:

"The question is whether there can be an absolute Assignment of a part of a debt within sec. 25, sub-sec. 6 of the Judicature Act, 1873. It seems to me that the language of that sub-section *prima facie* has reference to a *whole debt* or *chose in action*. I will assume for a moment that that may be so. What ought I then to consider? In my opinion I ought to consider what the results would be of holding that there can be a valid legal assignment of part of a debt, and whether those results are such as are contemplated by the section. Now, I do not think it was intended to throw any greater burden on the debtor than had previously existed. The position, formerly, of a debtor as regards a legal debt which had been assigned was that an action could be brought against him, but the assignor, except in certain exceptional cases, was a necessary party to the action either as plaintiff or defendant, in order that he might be bound, as well as the debtor and the assignee, by the decision of the case. I should certainly assume, although I do not know of any authority to that effect, that if a part of a debt had been assigned

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to A., and another part to B., and A. had brought an action to recover his part, he would have been obliged not only to make the assignor a party, but B. also, so that there would be one action which would decide the relationship of the debtor to each of the persons who owned a part of the debt; and the question would be decided once for all between all the parties. But if an absolute assignment of part of a debt is valid under sec. 25, sub-sec. 6, the consequence is that the assignee is able to sue the debtor without joining the assignor or the assignee of the other part of the debt, if there have been two assignments; and it might happen that if the debt had been split up into two, three or four parts, there might be two, three or four actions with different results. All sorts of difficulties would arise, and a great burden, an unnecessarily great burden, would be placed upon the debtor. In the case of a Judgment debt, that consideration applies with even greater force because the remedy on a Judgment debt is execution, and the result would be that if a Judgment debt was divided into, say three or four parts, each of which was assigned to a different person, there might be three or four executions, and three or four petitions in Bankruptcy, and the debtor might be considerably and unnecessarily harassed. These considerations, in my opinion, point to the fact that I ought not, unless compelled by the language of the section, to construe the words "legal debt or chose in action" as including part of a legal debt or part of a chose in action. I think some consideration should also be given to the fact that sec. 25, sub-sec. 6, deals only with absolute assignments and not with assignment by way of charge. For these reasons I should, apart from authority, come to the conclusion that the assignment of part of a debt or part of a legal chose in action is not within sec. 25, sub-sec. 6.

I pass to the consideration of the decision of Darling, J., in *Skipper & Tucker* v. *Holloway* (*supra*), and as I have said, I am bound to give great weight to that decision, because he had all the authorities cited to him and he considered the matter. The ground of his decision appears, I think, from the following passages in his judgment:—"It is clear that there can be an absolute assignment of a future debt." I agree that that is so, but it is important to remember that the reason is that an assignment of a future debt was considered in equity to amount to a contract to assign that debt, and when the debt had accrued due and become ascertained, equity treated the agreement to execute an assignment as an assignment, and therefore it became then, and not till then, an assignment of the debt. But no action could be brought against the debtor until the debt was due, and the Judicature Act gave the same right to the assignee then as he would have had if the debt had existed at the time of the original assignment." Darling, J., went on to say:—"That helps very considerably in deciding whether there can be an assignment of a portion of a debt, because in the case of an assignment of a future debt, it is impossible to say what the amount of the future debt may be at the time of the assignment, as it does not exist at that time." The answer to that is that before any action could be brought, or before an assignee can take advantage of the provisions of sub-sec. 6, the debt must be absolutely due. "It is,

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therefore, not necessary that there should be an existing debt of an exact amount in order that it may be validly assigned." It seems to me that the reason given by Darling, J., for his decision is an insufficient reason, and he does not appear to have considered the great and unnecessary and, as it seems to me, unfair burden which would be thrown on a debtor by holding that there can be an absolute assignment of part of a debt within the section. Certainly Darling, J., did not consider the case of a judgment debt, upon which leave to issue execution might, according to the contention of the present plaintiff, be applied for and granted to two or more different persons.

I therefore hold that there cannot be an absolute assignment within sec. 25, sub-sec. 6, of part of a debt or legal chose in action, and inasmuch as a judgment debt is a debt or legal chose in action, it follows that part of a judgment debt cannot be the subject of an assignment within the section. The other question is a difficult question of fact, and as it is now becomes unnecessary for me to decide it, I prefer to express no opinion upon it."

The case went promptly to the Court of Appeal; and the following is the Judgment of Lord Justice Vaughan Williams (1910, 2 K.B. 638):—

"I think that this appeal fails. I will deal with only one of the points discussed before us. Upon others I feel some doubt, and I will not pronounce any judgment upon them. A Judgment Creditor could not before the coming into operation of the Judicature Act, 1873, have issued a series of small executions upon his judgment, making in the whole the total amount of the judgment debt; he had only one judgment, and upon that judgment he could issue only one execution; he has only the same right now. And if a judgment creditor assigned part of his judgment debt, he *could not then, and cannot now, give to his assignee any better right than he had himself.* The result is, therefore, that the assignee of part of a judgment debt is not in a position to issue execution upon it, which is what the plaintiff in the issue wishes to do in the present case."

Hon. Fletcher Moulton, L.J., concurred.

Now I submit that though this Judgment rather seems to avoid the real question covered by the Judgment of Mr. Justice Bray, yet every word of it, so far as it declares a principle or a right, is directly applicable to the assignability of a part of a contractual obligation or Chose in Action under the Judicature Act, 25 (6).

The Judgment is itself a Chose in Action. It can be sued on and enforced by action if necessary, but

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it may also be enforced by the mere issue of an Execution. It does not destroy the obligatory relationship of the parties under the original Contract, but merely elevates them and imparts a legal sanction to them. If the assignment of a part of a Contractual Chose in Action were within the statutory authority of Section 25 (6) of the Judicature Act there would be nothing to prevent the owner of the Judgment from assigning a part of it, and nothing to prevent the assignee from pursuing his remedy as to that part by issuing an Execution. Any Rule of Court to the contrary would be simply *ultra vires;* for Rules of Court cannot make and much less alter substantive Law or the Right of a Judgment Creditor to issue an Execution for his Judgment debt. The decision of the Court of Appeal that a Judgment debt which is a Chose in Action cannot be divided and assigned in parts under Section 25 (6) of the Judicature Act, is I submit conclusive with regard to every other Legal Chose in Action; for the Judgment debt like the Contractual debt is simply a Right enforceable by process of Law —the Judgment debt by an Execution and the Contractual debt by an action. The Right to one process is indivisible, so is the right to the other; and the exclusion of a part of a Judgment debt from section 25 (6) of the Judicature Act excludes the parts of every other Chose in Action. *Quid est demonstratum.*

Regina, November, 1922.

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THE MODERN HISTORY OF THE DOCTRINE OF CONSIDERATION.[1]

By W. S. Holdsworth,[2] K.C., D.C.L.

In the first place I shall say something of the term consideration. We shall see that the history of the term, and the manner in which it gradually came to be a word which acquired different technical meanings in the spheres of the equitable and common law jurisdictions, tell us something of the place which it acquired in the law of contract, and some of the characteristic features which it there developed. In the second place I shall give some account of the development of the doctrine during the sixteenth and seventeenth centuries. Some of the rules then developed have become the settled rules of the modern common law; but they did not attain this position without difficulty. We shall see that though the chief and most permanent elements in the modern doctrine of consideration have sprung from the procedural requirements of the action of assumpsit, many difficulties have arisen in the process of translating these procedural rules into the rules of the modern doctrine. These difficulties have arisen partly from the fact that the action of assumpsit was constantly expanding all through this period; but chiefly from the fact that other elements derived from other sources made their influence felt. We shall see that we must reckon with influences derived from the

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[2] Of Lincoln's Inn, London; Fellow of St. John's College and All Souls Reader in English Law in the University of Oxford; an eminent and very distinguished authority on the jurisprudence and History of The English Common Law, who, by his monumental History of English Law (published in 1903) has made his debtor all jurists in both Great Britain and the United States. The numerous and erudite articles of Dr. Holdsworth, which, during the last decade have appeared in the leading British and American law reviews, are well-known to the members of the legal profession in both hemispheres.—Ed.

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action of debt, with the influence of the idea of consideration which was being developed by the Court of Chancery, and, later, with the influence of continental systems of law which came through the law merchant. Some of these influences helped to introduce into the doctrine of consideration an element of moral obligation which threatened at one time to reduce it to a position of merely evidential value; and, long after this idea had been got rid of, they exercised a disturbing influence on its evolution. It was not till this disturbing influence was removed by the decisions of the last three-quarters of the nineteenth century that the doctrine has been settled mainly on the basis of those ideas derived from the action of assumpsit from which it started in the sixteenth and seventeenth centuries. With these two topics, therefore, its development in the eighteenth and early nineteenth centuries, and its settlement in the last three-quarters of the nineteenth century, I shall deal next. Lastly I shall endeavour to estimate briefly the comparative merits of the English doctrine of consideration and the modern continental developments of the Roman *causa*.

THE TERM CONSIDERATION.

The one idea which the early common law borrowed from the Roman law was the idea that the nude pact was not enforceable.[3] This idea was adapted to the common law of the thirteenth century, and took shape in the principle that only those agreements were actionable which could be brought within the competence of some one of the older personal actions.[4] But as soon as the older personal actions began to be employed for the purpose of enforcing certain kinds of agreements it began to be obvious that some word or expression was needed to differentiate the kind of agreements which could be enforced by them from the agreements which could not. It was in connection with the action

[3] Holdsworth, *Hist. Eng. Law*, iii., 318.
[4] For these actions see *ibid.* 322-328.

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of debt that this need was chiefly felt, for the requirement of a sealed writing as a condition precedent for bringing the action of covenant supplied a clear test of enforceability. But debt did not lie unless the plaintiff had given something for the promise; and the expressions used to signify that the plaintiff had satisfied this requirement were at first general words, such as "cause" or "occasion," since the benefit received was generally the motive or reason for making a grant.[5] In the fifteenth century, however, the more precise expression *quid pro quo* had been appropriated to express the conditions under which the action of debt would lie; and, in consequence, it had begun to acquire almost a technical meaning. [6] But, because the expression *quid pro quo* had thus acquired a technical meaning, some more general word was needed to express the acts or other circumstances which had led up to, or were the motive or reason for, a given transaction. It is clear from the Year Books of the fifteenth and early sixteenth centuries that the word "consideration" was used for this purpose; and the way in which it was used shows that it had no sort of technical meaning.[7] It became clear, however, that, as soon as the action of assumpsit began to expand, so as to remedy non-feasances in breach of agreements on the faith of which the plaintiff had incurred some charge, the need for some compendious word to express the incurring of this charge, which rendered the agreement actionable, would be very strongly felt. The expression *quid pro quo* was clumsy and had been

[5] "Par lescrit qil mest avant il suppose qe nous fera certein services less queux sont la cause de sa demands," Y. B. 6, 7 Edw. II. (S.S.) 83 *per* Westcot *arg.*: "Dont del hure que ceste annuite fu grante issint pur les services issint les services sont locacsion," Y. B. 5 Edw. II. (S. S.) (1312), 2 *per* Herle *arg.*

[6] Holdsworth, *Hist. Eng. Law*, iii. 327-8.

[7] An instance of the untechnical use of the word at common law will be found in Y. B. 12 Edw. IV. Mich. pl. 2 *per* Choke, "S'il dit que un estranger baile les biens a luy sans ceo que le pleintiff baille, ce n'est purpose, car icy n'est nul *consideration*, per que il duist traverser le contrary:" and Y. B. 20 Hy. VII. Mich. pl. 20, "bargaine ou autre *consideracion*."

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appropriated to the action of debt.[8] On the other hand the expression "consideration" was a more convenient word, both because it had a far more general significance, and because, within the sphere of the common law jurisdiction, it had not yet become a technical term.

While these developments were taking place in the sphere of the jurisdiction of the common law courts, the Court of Chancery had been obliged to tackle a somewhat similar problem. For the purpose of its jurisdiction both over uses and over contract it had become necessary to lay down conditions as to the circumstances under which it would act. It had become necessary to distinguish between the enforceable and the unenforceable agreement, and between cases in which it would and cases in which it would not protect a *cestui que* use. In the case of contract it adopted the canonist theory of *causa,* and the English word which it used to express this conception was consideration.[9] This use of the word tended to give the term if not a more technical, at any rate a more precise meaning. Possibly it might have acquired the same technical meaning as the canonists had given to the word *causa* if the Court of Chancery had been able to gain control over the development of the law of contract. But the common law rejected so wide a test of the enforceability of contracts; and the theory of contract evolved in the sphere of common law jurisdiction became the theory of English law. Hence consideration used in this sense failed to get a foothold in English law, and this use of the term disappeared with the disappearance of the theory of contract which had begun to be worked out by the mediaeval chancellors. On the other hand, the use of the term in connection with uses did get a permanent foothold in English law. In that connection it was used to express the conditions under which equity would imply a use; and, in the course of

[8] "The term *quid pro quo* was exceedingly awkward, and besides, usage had associated this term exclusively with debt," Street, Foundations of Legal Liability, ii. 37.

[9] L. Q. R. XXIV., 382.

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the sixteenth century, those conditions had come to be either the creation of a tenure, the payment of money, or love and natural affection. The first kind of consideration soon ceased to be important. But the two last termed respectively "valuable" and "good" consideration came to be technical terms of permanent importance in the law of conveyancing. We shall see that this use of the term by equity has had an appreciable though an indirect influence upon certain phases in the later history of the doctrine of consideration developed by the common law courts.[10]

Thus, in the earlier half of the sixteenth century the word consideration, when used in connection with the law of contract, had not acquired a technical meaning either at law or in equity. It was, no doubt, frequently used, but other words and expressions were often used in competition with it to express the same idea. Thus, as Mr. Street points out,[11] St. Germain in the Doctor and Student uses the following expressions: "Recompense (four times), cause (three times), a certain consideration (twice), consideration of worldly profit (once), cause in the sense of a desire to maintain the cause of learning or service of God (once), *quid pro quo* (once), goods or some other profit (once), thing assigned for a promise (once), new charge (once), charge by reason of the promise (once)." The *Terms de la Ley*[12] defines it as the material cause or *quid pro quo* of a contract without which it will not be effectual or binding—thus explaining the use in the law of contract of the as yet less technical word "consideration" by reference to the more technical expression *quid pro quo.*" Similarly in *Sharington* v. *Strotton* (1566),[13] which was a case which turned upon the sufficiency of love and natural affection to raise a use, it is clear that in relation to the law of contract the term is used in a semi-popular sense to mean the cir-

[10] Below 18-20, 43, 44. See *infra.*
[11] *Foundations of Legal Liability*, ii, 39, n. 1.
[12] "Cited *ibid* 39, n. 9.
[13] Plowden, 300.

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cumstances which will make the contract enforceable either by the action of debt or by the action of assumpsit.[14] In *Calthorpe's Case* (1574),[15] it is used in quite a general way to mean "a cause or meritorious occasion requiring a mutual recompense in fact or in law";[16] various illustrations are given of the need for a consideration in this wide sense in the law of property; and in contract the need for it is illustrated by a reference to the *quid pro quo*.[17]

But, during the latter half of the sixteenth century, assumpsit became alternative to debt when debt was brought on a contract, and it became also a remedy on purely executory contracts.[18] By the end of the century, therefore, it had become definitely the chief contractual action of the common law. But it had become usual during the latter part of that century to use the word "consideration" to introduce the facts which were relied on to make the promise enforceable by assumpsit.[19] Hence, it is not surprising to find that

[14] "For if upon consideration that you are my familiar friend or acquaintance, or my brother, I promise to pay you £20, at such a day, you shall not have an action upon the case or an action of debt for it, for it is but a nude and barren contract, *et ex nudo pacto non oritur actio*, and there is no sufficient cause for the payment nor is anything done or given on the one part, for you were my brother or my acquaintance before, and so will you be afterwards; so that nothing is newly done on the one part, as is requisite in contracts, and also in covenants upon consideration." *ibid.* at p. 302.

[15] Dyer, 334b.

[16] At f. 336b.

[17] "Contracts and bargains have a quid pro quo," *ibid.*

[18] Holdsworth, *Hist. Eng. Law*, iii, 343-5.

[19] *Josclin* v. *Shelton* (1557), 3 Leo. 4, where "the plaintiff declared that the defendant, in *consideration* that the son of the plaintiff would marry the daughter of the defendant, assumed and promised to pay to him, etc.," is perhaps the earliest instance of the use of the term in this sense; the Ames' Lectures on Legal Hist. 147 N-1, who cites this case and says that "it is a noteworthy fact that in the reports of the half dozen cases of the reigns of Henry VIII. and Edward VI. the word 'consideration' does not appear;" the fact that in *Whorwood* v. *Gybbons* (1587), Golds. 48, it was said that "it is a common course in actions upon the case against him by whom the debt is due, to declare without any words *in consideration*," testifies at once to the growing habit of using these words, and to the fact that the usage was not quite settled: it was fairly well settled in 1585, for Periam, J., in *Sidenham and Worlington's Case*, 2 Leo. at p. 225, said: "In an action upon the case upon a promise, the declaration is laid, that the defendant for and in consideration of £20 to him paid (postea siel.), that is to say, at a day after super se assumpsit."

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the word then acquired the technical meaning of the facts or circumstances which must be proved in order to make a promise enforceable by this action. This fact is clearly illustrated by Chief Baron Manwood's answer to a writ of error in a case to which he was a party.[20] Not only does he throughout his answer use the word consideration in this sense, but he also classifies the various possible considerations as follows: "There are," he says, "three manner of considerations upon which an assumpsit may be grounded: 1, a debt precedent; 2, when he to whom such a promise is made is damnified by doing anything, or lends his labour at the instance of the promiser, although no benefit cometh to the promiser . . . 3, or there is a present consideration."[21] It is clear that the second of these considerations originates in the extension of the action of assumpsit to cover certain kinds of non-feasance in breach of an undertaking; that the first originates in the extension of the action to enforce a promise to pay an existing debt (*indebitatus assumpsit*); and that the third originates in the extension of the action to enforce a promise which is given in return for a promise.

Consideration thus acquired its technical meaning in the common law mainly in relation to the action of assumpsit. It became the compendious word used to express the conditions under which that action would lie, and therefore the condition precedent for the validity of all those contracts which could only be enforced by that action. Hence, as we shall see, the leading characteristics of consideration which emerged in the sixteenth and seventeenth centuries originate in the rules for the competence of this action. But the lawyers, in extending the action of assumpsit to cover the field of simple contracts, used analogies taken from the action of debt; and they were fully aware of the analogy existing between the *quid pro quo*, which the plaintiff must prove in order to succeed in an action of

[20] *Manwood and Burston's Case* (1587), 2 Leo. 203.
[21] *Ibid.* at p. 204.

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debt, and the consideration, which he must prove in order to succeed in an action of assumpsit. It is not surprising, therefore, that ideas derived from the *quid pro quo* should have had permanent influence on the development of the law of contract, and that its influence should still be apparent not only in the sixteenth century,[22] but also in the definition of consideration accepted in our modern law.[23] Similarly the term consideration had developed a different technical meaning in equity. As the relations between the Court of Chancery and the common law courts were close, it is not surprising that the meaning attached to the term in equity should have influenced indirectly the meaning attached to it by the courts of common law.[24] The result is that, though the main principles of the doctrine of consideration have been developed as logical deductions from the conditions for success in the action of assumpsit, other influences have made themselves felt; and, in the eighteenth and early nineteenth centuries some of them seemed likely to give the doctrine a shape very different from the shape which it was taking in the sixteenth and seventeenth centuries, when it was being developed mainly from its procedural basis in assumpsit.[25] During the nineteenth century a return was made to this procedural basis.[26] But the result has been that the final shape of the doctrine has not been settled till quite modern times.

To the history of this settlement we must now turn; and firstly we must consider some of the leading characteristics of the doctrine which emerges in the sixteenth and seventeenth centuries.

CONSIDERATION IN THE SIXTEENTH AND SEVENTEENTH CENTURIES.

The main influence which shaped the development of the doctrine during this period must be sought in

[22] See *infra*.
[23] See *infra*.
[24] See *infra*.
[25] See *infra*.
[26] See *infra*.

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the nature and competence of "express" or "special" assumpsit.[27] But other influences, which came partly from the actions of debt and account and the action of *indebitatus assumpsit* which during this period was superseding them; and partly from the equitable treatment of consideration, tended to modify and even sometimes to contradict the principles which flowed logically from the nature and competence of "express" or "special" assumpsit. The result was that, at the end of the seventeenth century, the principles underlying the doctrine were on many points obscure and confused. Ideas which originated from these diverse sources had led to contradictory decisions on very similar sets of facts; and though certain principles originating from the procedural basis of special assumpsit seemed to be firmly grasped, the competing influences had sometimes given rise to decisions which cast doubts or imposed limitation even on these principles.

Obviously it is difficult to give a clear account of the genesis of a doctrine which began its career amid these conflicting influences. I think that it will be best understood if I take certain of the principles which were obviously derived from the conditions under which special assumpsit or *indebitatus assumpsit* lay, and then consider in each case whether and to what extent they were modified by other competing influences. The principles which I propose to treat upon these lines are the following: 1. Consideration may consist in mutual promises, a precedent debt, or a detriment to the promisee. 2. Consideration need not move to the promiser, but it must move from the promisee. 3. Consideration may be executory or executed, but it cannot be past. 4. Consideration need not be adequate, but it must be certain. 5. Consideration must be an act or forbearance of some value in the eye of the law.

[27] 'Special' assumpsit was brought on a contract, and *indebitatus* assumpsit was brought on a debt formerly only enforceable by action of debt.

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I. CONSIDERATION MAY CONSIST IN MUTUAL PROMISES, A PRECEDENT DEBT OR A DETRIMENT TO THE PROMISEE.

It was settled during the latter part of the sixteenth century that mutual promises, provided that they were made at the same instant, were consideration for each other.[28] It was only through the action of assumpsit that wholly executory contracts of this kind could be enforced. Therefore the rule thus ascertained for the competence of assumpsit could not be affected by rules derived from any other source. From the end of the sixteenth century it has been accepted without question or doubt, and for that reason it has no history.

It was settled in *Slade's Case*[29] that a precedent debt was consideration for a subsequent promise expressed or implied to pay it. But it is clear that this kind of consideration is difficult to reconcile with the undoubted rule that a consideration cannot be past. This objection was raised in 1617[30] to an assumpsit on an express promise to pay a precedent debt for goods delivered; but it was overruled on the ground that, as the debt always continued, the consideration was not past.[31] But obviously, as the delivery of the goods which constituted the debt was a past act done without any reference to the express subsequent promise, it was not comparable, as Haughton, J., apparently tried to argue,[32] to an executed consideration. It was, in fact, a past consideration; but, in spite of this fact, it was well settled that assumpsit lay. We shall see that this rule that a precedent debt was a valid consideration for a subsequent promise had a large effect upon

[28] (1603) 4 Co. Rep. 92b.

[29] *Strangborough and Warner's Case* (1589), 4 Leo. 3; *Slade's Case* (1602), Co. Rep. at ff. 94a, 94b; Coke cites *Pecke* v. *Redman* (1555), Dyer 113a, Co. Rep. at f 94a; but it is not clear that the contract was in that case wholly executory.

[30] *Hodge* v. *Varisour*, 3 Bulstr. 222.

[31] "The debt here always continues," *per* Dodderidge, J., at p. 223.

[32] "In consideration that the plaintiff hath built a house for the defendant, he did assume and promise to pay him so much, this is executed, here the assumpsit is for money, this is to be paid on request; here the defendant is clogged with a debt continually, and therefore this is here a good consideration to raise a promise."

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the growth of the doctrine by helping to introduce the notion that the presence of a moral obligation might be sufficient to constitute a consideration.[33] We shall see, too, that this notion tended to obscure the law as to the difference between a past and an executed consideration, and to introduce doubts and difficulties as to the validity of a past consideration.[34]

That consideration could consist merely in a detriment to the promisee was clearly recognized in the Doctor and Student,[35] and in many cases decided at the end of the sixteenth and the beginning of the seventeenth centuries.[36] One instance will suffice. In *William Bane's Case*[37] (1612), where an executrix, in consideration of forbearance, promised to pay the debt of her testator, it was held that the consideration was good; "for it is as much as if a stranger had said to the plaintiff (forbear your debt, and do not sue the defendant till Michaelmas, and at the said feast I will pay you your debt), that is a good consideration, although it cannot be any benefit to him who makes the promise; yet because it is a damage to the creditor to forbear his suit or duty it is a good consideration."[38] This is clearly the direct result of the fact that assumpsit was originally an action in tort; for it followed that the gist of the action was not the benefit got by the defendant-promisor, but the detriment incurred by the plaintiff-promisee on the faith of the defendant's promise. But in many, perhaps in most cases, the detriment incurred by the promisee is also a benefit to the promisor; for this is always the case when the detriment consists in a payment, conveyance of property or service rendered to the promisor. In the action of debt the lawyers naturally regarded the

[33] See *infra*.
[34] See *infra*.
[35] Bk. II, c-24.
[36] See *Richard's and Bartlet's Case* (1584), 1 Leo. 19, cited *infra* 34: *Greenleaf* v. *Barker* (1591), Cro. Eliza. at p. 194: *Knight* v. *Rushworth* (1596), *ibid.*, at p. 470; and see the other cases cited by Ames, *Lectures on Legal History*, 143 n. 3.
[37] 9 Co. Rep. f 93b.
[38] At f 94a.

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matter from the side of benefit, and asked whether the promisor had received a *quid pro quo*. But we have seen that when consideration was as yet an untechnical word it was sometimes used synonymously with *quid pro quo*.[39] Thus it is not surprising to find that Coke said that "every consideration that doth charge the defendant in an assumpsit must be to the benefit of the defendant or charge of the plaintiff";[40] and that the accepted definition of consideration is that it consists in "some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other."[41] In truth, detriment to the promisee is of the essence of the doctrine, and benefit to the promisor is, when it exists, merely an accident.[42] The idea that benefit to the promisor is as much of its essence as detriment to the promisee is, as it has been truly said, "a heritage from debt."[43] In fact, it comes from a period when analogies taken from the action of debt were used to explain the extensions made in the sphere of the action of assumpsit, and when the doctrine of consideration was in its infancy; but it has lasted long, and has had in consequence some influence on the evolution of the doctrine. That it is erroneous and that it has been influential we shall see more clearly in the following paragraphs.

[39] Above 8.

[40] *Stone* v. *Wythipil* (1588), Cro. Eliza., at p. 126; so also in *Greenleaf* v. *Barker* (1591), *ibid.*, at p. 194, Gawdy and Fenner, JJ., said, "every consideration must be for the benefit of the defendant, or some other at his request, or a thing done by the plaintiff, for which he labours or hath prejudice."

[41] *Currie* v. *Misa* (1875), L. R. 10 Ex., at p. 162; similarly Martin, B., in *Scotson* v. *Pegg* (1861), 6 H. & N., at p. 299, said that "any act done whereby the contracting party receives a benefit is a good consideration for a promise by him," and Wilde, B.'s judgment *ibid*, at p. 300 is partially based on the same view of consideration; see *infra*.

[42] This was for the first time pointed out by Langdell, *Contracts*, 864.

[43] Street, *op. cit.*, ii 68; as Langdell, *op. cit.*, 864 says, "one of the most striking differences between debt and assumpsit in respect to consideration is, that in debt the consideration must inure to the benefit of the debtor, while in assumpsit it may inure to the benefit of the promisor, or of some third person, or to the benefit of no one."

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(2) CONSIDERATION NEED NOT MOVE TO THE PROMISOR, BUT IT MUST MOVE FROM THE PROMISEE.

The essence of consideration is thus not a benefit to the promisor-defendant, but a detriment to the promisee-plaintiff. That detriment may, it is true, have resulted in a benefit to the defendant; but this fact—if fact it be—is, as we have seen, wholly immaterial. But though the detriment to the plaintiff need not have resulted in any benefit to the defendant, the form of the action made it necessary that the detriment, incurred on the faith of the promise, should have been incurred by the plaintiff to whom the promise was made; for it is he alone to whom the promise has been made, on the faith of which he has suffered a detriment by altering his position. This principle was recognized in the seventeenth century. In 1646 it was held that where J and B contracted with each other that each should pay a sum of money to their children who had intermarried, the administrator of B. could sue J. for his contribution, "though he should receive no benefit if he did recover ";[44] and in 1668 in the case of *Bourne* v. *Mason*[45] a plaintiff was non-suited because "he did nothing of trouble to himself or benefit to the defendant, but is a mere stranger to the consideration."

This principle seems to us to be almost too plain for argument,—on historical grounds because it is an obvious deduction from the conditions under which assumpsit lay, and on logical grounds because it is an elementary principle of contract law that only the parties to the contract can be bound by or take benefits under a contract. But it was by no means firmly grasped at this period. This was due mainly to three causes.

(i) The disturbing influence of the equitable conception of consideration.

[44] Anon. Style, 6.
[45] 1 Ventris 6.

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We shall see that in the sixteenth century it was distinctly asserted that, though love and natural affection were sufficient considerations to raise a use, they would not support an assumpsit.[46] But in *Bourne* v. *Mason*, earlier cases which were influenced by this conception were approved. In the first of these cases it was held that a son could sue on a promise made to his father to settle land on his marriage; and in the second it was held that the daughter of a physician could sue on a promise made by her father to give her a sum of money if he performed a cure. In the first case, said the court, "the parties that brought the assumpsit did the meritorious act, though the promise was made to another"; and in the second case "the nearness of the relation gives the daughter the benefit of the consideration performed by her father." The latter reason, which is plainly inspired by the equitable conception, was the ground of the decision in *Dutton* v. *Poole* (1677).[47] In that case it was held that a promise made by a son to his father to pay £1,000 to his sister could be enforced by the sister. Scroggs, C.J., said that "there was such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children." It is true that in 1724 in the case of *Crow* v. *Rogers*[48]—a case which did not involve a family settlement—*Bourne* v. *Mason* was followed, and a stranger to the consideration was not allowed to sue. But it is clear that, as the law stood at the end of the seventeenth century, ideas derived from the equitable conception of consideration had introduced a considerable excep-

[46] See *infra*.

[47] 2 Lev. 211; we see the same confusion in Parker, C.J.'s judgment in *Mitchel* v. *Reynolds* (1711), 1 P. Wms., at p. 193.

[48] 1 Stra. 592; cp. *Butcher* v. *Andrews* (1699), Carth. 446, where a plaintiff who brought assumpsit against a father for money lent to the son at the father's request was not allowed to recover; Holt, C.J., said: "If it had been an *indebitatus* for so much money paid by the plaintiff at the request of the defendant unto his son, it might have been good, for then it would be the father's debt, and not his son's: but when the money is lent to the son, 'tis his proper debt, and not the father's."

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tion to the rule that consideration must move from the promisee which tended to obscure the common law doctrine.[49] It was not till the decisions of the nineteenth century[50] that this obscurity was removed; and, as we shall now see, its effect was increased by the second of the two causes which hindered the clear perception of this principle.

(ii) The disturbing influence of the idea derived from the competence of the actions of debt and account that a person not a party to an agreement may take benefit thereunder.

If money were paid by A to B for the use of C, C could sue by action of debt or account; and in the seventeenth century he could make use of the action of *indebitatus assumpsit*. Thus in 1651 in the case of *Starkey* v. *Mill*[51] a father gave goods to his son in consideration that the son should pay the plaintiff £20. The objection that there was no consideration moving from the promisee was overruled; and Rolle, C.J., said "that there was a plain contract, because the goods were given for the benefit of the plaintiff though the contract be not between him and the defendant, and he may well have an action upon the case,[52] for here is a promise in law made to the plaintiff, though there be not a promise in fact, etc., and there is a debt here; and the assumpsit is good." It would seem, too, from a dictum of Holt's that he agreed with this reasoning.[53]

[49] For another curious confusion between the equitable and common law use of the term see the judgment of Parker, C.J., in *Mitchel* v. *Reynolds* (1711), 1 P. Wms., at p. 193, cited below.

[50] See *infra*.

[51] Style, 296.

[52] The action on the case here brought was assumpsit.

[53] "If A. assumes to B. to pay money to C. upon good consideration, C. may have an action against A. for this money," *Yard* v. *Eland* (1699), 1 Ld. Raym., at pp. 368-9.

(*To be continued*).

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THE LEGACY THAT REBOUNDED.

By Marvin Leslie Hayward, B.C.L.

Albert Bradbury leaned back in his debilitated office chair and gazed across the battered desk at his pretty little niece, who seemed oddly out of place in the old miser's cobwebby-den dedicated, as it was, to usury, foreclosure, and ways that were dark, vain and devious.

"I suppose you were surprised to get my note," he suggested.

"I certainly was not looking for it," Ethel Thurston admitted quite frankly.

"My proposal is short and to the point," Bradbury declared. "I want you to come and live with me, look after the house and servants and take charge of things generally."

"Live with you," exclaimed Ethel.

"Yes, that's what I said. I'm getting old now," sighed Bradbury. "My life is a very lonely one, far more lonely than the world knows, and I would like to have some of my own kin near me. After all, blood's thicker than water."

Bradbury saw at a glance that the kinship appeal was his strong card.

"Of course, uncle," agreed Ethel, "I would like to do anything I could to please you; but it is a great surprise that you should want me to live with you. Our families have never been intimate, and father always felt that you did not use him right about the Restigouche timber limits. In fact," she said, truthfully, "shortly before he died he warned me never to trust you in any business matter."

"We were both to blame in those days," Bradbury murmured soothingly, "but why can't we let bygones be by-gones. You come and live with me, brighten the evening of my life with your cheery presence and I'll leave you well provided for. And it

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may not be for long," he added pathetically, but with a cunning gleam in his miserly eyes.

"I would like to come, uncle, if you think it would suit you. But there's Earle; we are engaged, you know," she added shyly.

"How much is he worth?" snapped Bradbury. The financial test was always the conclusive one.

"He hasn't much ahead," admitted Ethel, "but he has a fair income, and we were planning to be married next year."

"And try the old experiment of 'Love in a Cottage,'" Bradbury sneered. "Better accept my proposition and I'll not bother you long. Then with a $10,000 legacy from me you will be in a position to start married life without the handicap of poverty."

Ethel hesitated. "Don't you think you owe some duty to your own people," Bradbury pleaded. "I'm the nearest living relative you have left, and I'm not asking you to make any real sacrifice by giving up your projected marriage for a few years, possibly a few months. It will brighten up my old life more than I can tell you, and the legacy I shall leave you will be some slight recompense for what you would, no doubt, call your wasted time."

"I'll have to think it over," she demurred, as she thought of Earle's evident disappointment, and the young lawyer's opposition was certainly far more strenuous than even she had anticipated.

"What," he expostulated, "live with that old miser for two or three years, run his house, look after the servants, put up with his petty meanness, and postpone our marriage in the meantime. Why, it can't be thought of."

"But he is so old and lonely," pleaded Ethel.

"What made him old," fumed Earle, "but gloating over his money, and anyone as disagreeable and malicious as he is must expect to be lonely."

"But he promised me a legacy of $10,000," she pleaded, "and with that we could certainly start married life on a different scale from our former plans."

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"Well," retorted Earle, "if you think that Albert Bradbury's going to so far forget himself as to keep his word you are mistaken. Why, his business associates wouldn't take his word for a dollar."

"I'm not used to hearing my relatives criticized in that fashion," she remarked icily, admitting to herself at the same time that she had often heard her father express the same opinion in more sulphurous terms.

"Oh, well," he declared, "if you care more about the promise of a legacy from Old Bradbury than for me, I suppose there's nothing more to be said."

"And if you are as selfish as that," Ethel replied, "there certainly isn't."

Six months later Gilbert Earle, Attorney-at-Law, sat at his desk and scowled moodily at the front of the Royal Bank building on the opposite side of Prince William street.

"Old Bradbury's been dead six weeks," he mused, "and if Ethel don't call on me this week, I'll climb down and see her. I wish I knew what the old reprobate did about the legacy he promised her. Of course, he didn't keep his word, but if I was only sure he hadn't, I'd telephone her right now.

"Why Ethel," he exclaimed, as the object of his meditation entered the office.

"Surprised to see me, no doubt," she suggested.

"And delighted too, I assure you," Earle declared. "But what can I do for you?"

"You remember that matter of uncle's will," she suggested shyly.

It seemed to him that for the past six months he had remembered nothing else.

"I could hardly forget it when it broke our engagement and robbed me of the only girl I ever loved," was the reply that trembled on his lips, but when he spoke it was in the professional tone of a busy attorney.

"Let me see," he mused, "as I remember it you

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were to live with him and in return he held out a certain hope of a certain $10,000 legacy, did he not?"

"I suppose you are aware he died last month?" she replied.

"Yes, I saw the announcement in the *Star,* and presume he neglected to leave you the promised legacy."

"Your presumption is correct," Ethel replied coldly.

"If I remember the decision in *Alderson* v. *Maddison* correctly," replied Earle, "you have a good action against his estate for the amount of the legacy."

"I don't care about the legacy," she hastened to reply, "but I wanted to consult you about a clause in the will," and she handed over a certified copy of the document.

"The fourth clause," she explained.

"Whereas, 'he read,' my niece Ethel Thurston has for the past six months lived with me in the position of a housekeeper, and during that time has had the handling of my money for various purposes, and, like her father before her, has stolen large portions thereof, I therefore leave the said Ethel Thurston the sum of one dollar in full for all claims against my estate."

"The old scoundrel," he exclaimed, "not satisfied with breaking his agreement he takes this fiendish method of having the last word and gets the statement on the records of the court."

"I should have known better," she admitted, "but I could even forgive him for the reference to myself if he hadn't traduced father's memory as well."

"Sue him," urged Earle. "Enter suit against his estate for damages for libel, raise—"

"Mr. Davies, our family attorney, advised me," said Ethel, "that I could sue the estate and recover the $10,000 legacy that he promised me, but I refused. I felt that if uncle didn't care to keep his word I was not going to go to law about it."

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"Mr. Davies was perfectly correct from a legal standpoint," replied Earle, "and while I sympathize with your feelings in the matter, still these libellous statements in the will are different and you ought to make his estate dance for it."

"That's the way I feel about it," agreed Ethel, "and I told Mr. Davies so, but he said we couldn't do anything, and quoted something about 'actio personalis moritur cum persona,' if I remember the Latin correctly."

"Meaning that 'a personal action dies with the person,'" explained Earle. "That is, if you have a mere personal right of action against a party, that right cannot be enforced against his estate after his death; but that rule does not apply to a case like this, and there is no doubt that you could recover a substantial verdict."

"I will leave it to you," declared Ethel; "and you can start a suit if you wish, but don't actually bring it to trial, for I wouldn't go into court under any circumstances."

The next day Earle issued a writ against the estate of Albert Bradbury, setting forth the statement contained in the will and claiming $20,000 damages, and Harry Palmer, the attorney for the estate, called on Earle for a consultation in regard to the matter.

"Of course, I don't uphold Bradbury for putting those statements in the will," admitted Palmer, "for we all know they are false as H——, but all you can do in this suit is to show up his nasty disposition, for you'll surely lose, if I know the rudiments of law."

"We will show up his character," retorted Earle, "and at the same time recover a substantial verdict against his estate."

"Nothing like being sure," laughed Palmer; "but unfortunately for you the law is the other way."

"That's news to me."

"You surely know that the old maxim which lays down the principle that 'personal actions die with the person,'" replied Palmer patronizingly.

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"It is all right to know that maxim," retorted Earle; "but it is also necessary to know when the maxim applies, and if you look up the point you will find that it does not apply to libellous statements in a will, although it may apply to other libels written by the deceased in his lifetime."

"What authority have you for that proposition?" demanded Palmer, a bit anxiously.

Earle took down a volume from the bookcase and opened to a marked page.

"In the case of *Harris* v. *Nashville Trust Co.,*" he said, "found in 128 Tennessee reports, page 573, the court was called to decide exactly the same point which will arise in this case, and held that the estate of the deceased was liable for damages for a libel contained in the will. The court discussed very fully the application of the maxim 'actio personalis moritur cum persona,' and decided definitely it does not apply to a case of defamatory statements made in a will."

"'To turn now to consideration of the maxim, 'actio personalis moritur cum persona,'" read Earle, 'Translated and grammatically confined, this principle does not touch the present case. To say that an action dies with the person, or, as Lord Mansfield rendered it, "is buried" with the person, implies that the cause of action existed in the lifetime of the person; that it was existing while the person lived and abated with his death. The right of action here asserted never had any existence during the lifetime of the deceased, and it did not accrue until the publication of the libel, made by the Probate of the Will, after the testator's death. That is, the right of action arose after the testator's death and could not have been buried with him.'"

"Let me look at the case a moment," said Palmer, and he rapidly shot down the page indicated.

"That does put a different light on the matter," he admitted, "and we will possibly settle without suit.

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I will take it up with the Trust Company who are the executors and communicate with you."

"Remember that I am willing to accept a cheque at any time for $20,000 in full settlement and withdraw the suit," said Earle.

A few days later Ethel called at the office and Earle handed over the Trust Company's cheque for $20,000 which she promptly endorsed, payable to the order of the trustee of the Lewis Memorial Hospital.

"What does that mean?" demanded Earle.

"It means," replied Ethel, "that I wouldn't touch a cent of the money that he did not give me willingly, and this check will furnish a ward in the hospital in memory of my father."

"But it means more than that," declared Earle. "It means that I can ask you to renew our broken engagement without the possibility of the suspicion that I cared for the money."

"Yes, admitted Ethel shyly, "I had thought of that, too."

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OUR LONDON LETTER.

By Frank Gahan, M.A., LL.B. (Lond.), B.C.L. (Oxon.)
of the Inner Temple, Barrister-at-Law.

London, October 6th, 1922.

At the moment of writing, the long vacation is rapidly drawing to a close. It began on the 31st of July and will end next week. On Thursday next the Lord Chancellor and His Majesty's judges will attend the customary service at Westminster Abbey, and the choir will be crowded as usual with silk gowns—men and stuff gownsmen. At the same hour, Red Mass will be celebrated in Westminster Cathedral, a few hundred yards away. After the service, the judges and barristers will go in procession to the Royal Courts of Justice in the Strand — and the Michaelmas Sittings will have begun.

In Canada, where the two professions are amalgamated, I imagine that the long vacation interferes but little with the work of the busy lawyer. He is in the fortunate position of operating both swings and roundabouts; and when the swings are brought to a standstill by the closing of the courts, he can, in his capacity of a solicitor, continue to do a thriving business on the roundabouts. The member of the English bar is in no such happy case. His work comes to a sudden stop the moment the long vacation descends like a pall upon the legal world. Lovers of Dickens will remember his description of the midsummer scene of desolation around the Law Courts and the Temple. The passage is unfortunately too long to quote in full, but those who are interested will find the deleted passages in the nineteenth chapter of *Bleak House*.

His Lordship's Ginger-beer.

It is the long vacation in the regions of Chancery Lane. The good ships Law and Equity, those teak-built, copper-bottomed, iron-fastened, brazen-faced, and not by any means fast-sailing Clippers, are laid up in ordinary. . . . The Courts are all shut up; the

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public offices lie in a hot sleep; Westminster Hall itself is a shady solitude where nightingales might sing, and a tenderer class of suitors than is usually found there, walk.

The Temple, Chancery Lane, Serjeant's Inn, and Lincoln's Inn even unto the Fields, are like tidal harbours at low water; where stranded proceedings, offices at anchor, idle clerks lounging on lopsided stools that will not recover their perpendicular until the current of Term sets in, lie high and dry upon the ooze of the long vacation. Outer doors of chambers are shut up by the score, messages and parcels are to be left at the Porter's Lodge by the bushel . . .

There is only one Judge in town. Even he only comes twice a week to sit in chambers. If the country-folks of those assize towns on his circuit could see him now! No full-bottomed wig, no red petticoats, no fur, no javelin-men, no white wands. Merely a close-shaved gentleman in white trousers and a white hat, with sea-bronze on the judicial countenance, and a strip of bark peeled by the solar rays from the judicial nose, who calls in at the shell-fish shop as he comes along, and drinks iced ginger-beer!

The bar of England is scattered over the face of the earth. How England can get on through four long summer months without its bar—which is its acknowledged refuge in adversity, and its only legitimate triumph in prosperity—is beside the question; assuredly that shield and buckler of Britannia are not in present wear. The learned gentleman who is always so tremendously indignant at the unprecedented outrage committed on the feelings of his client by the opposite party, that he never seems likely to recover, is doing infinitely better than might be expected, in Switzerland. The learned gentleman who does the withering business, and who blights all opponents with his gloomy sarcasm, is as merry as a grig at a French watering-place. The learned gentleman who weeps by the pint on the smallest provocation, has not shed a tear these six weeks. . . . Other dispersed fragments of the same great Palladium are to be found on the canals of Venice, at the second cataract of the Nile, in the baths of Germany, and sprinkled on the sea-sand all over the English coast. Scarcely one is to be encountered in the deserted region of Chancery Lane. If such a lonely member of the bar do flit across the waste and come upon a prowling suitor who is unable to leave off haunting the scenes of his anxiety, they frighten one another, and retreat into opposite shades. . . . Over all the legal neighbourhood there hangs, like some great veil of rust, or gigantic cobweb, the idleness and pensiveness of the long vacation.

Alas, where will such writing be found in the novels of this generation! There was at least one giant in the land in those much-maligned Victorian days.

Abolishing the Long Vacation.

It is something to the good that the four months of Dickens' day have been reduced to ten weeks in ours.

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Yet this is far from satisfying the younger generation of barristers. They have no desire whatever to curtail the holidays of their grave and reverend seniors—the men who have an established reputation and a large practice. On the contrary, they would be happy to see them go away and bask in Mediterranean sunshine for eight or ten months out of the year. They feel that neither the administration of the law nor the interests of suitors would suffer to any serious extent if entrusted to the younger men, who would gladly sacrifice sea breezes for briefs.

As Lord Justice Scrutton pointed out the other day, it is idle for litigants to complain about the four-figure fees that make the briefs of fashionable "silks" worth more than their weight in gold, when scores of comparatively unknown men would do the same work equally well for a modest fee of twenty or fifty guineas. As for the junior in large practice, everyone knows that it would be a physical impossibility for him to do all his own work. He surrounds himself with a flock or bevy of "devils"—I hardly know which term is the more appropriate—who, for the sake of nothing but the experience, are only too pleased to draft his pleadings and master his cases for him, while he pockets the guineas. These humble but efficient gentlemen naturally feel that they could do this work for themselves, just as skilfully as they now do it for their chief—and for a more modest fee than his.

But the demand for a shorter vacation comes in most insistent tones, not from briefless barristers, but from the Law Society, which is the mouthpiece of the solicitor branch of the profession. Year after year, the Law Society has passed resolutions in favour of a drastic curtailment of the long vacation; and it is safe to say that litigants and the public generally endorse this demand. As long as there are serious arrears in the cause list, it seems hard to justify the closing of the courts during no less than seventeen weeks of the year. So far, however, the judges have shown no

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particular desire to shorten their holidays, and the reform has been definitely opposed by the General Council of the Bar. which is composed, for the most part, of men in large practice who could hardly bear up under the burden of their work, if their vacations were cut down.

As far as the judges are concerned, nobody would be disposed to drive them too hard. Several of them are over seventy, and Mr. Justice Bray, who gets through more work than many of his younger brethren, is eighty. It is a matter of the highest national importance that these distinguished men should come to their high task with alert minds and even tempers; and the nervous irritability of the overworked business man is the last thing that anyone would want to see on the bench. The latest suggestion to meet the case is a revival of Bentham's proposal of more than a hundred years ago—that the number of judges should be increased so that the courts could sit all the year round and yet each individual judge have the same amount of leisure as at present. Needless to say, any suggestion to appoint more judges, or to carry on the work of the courts during the enforced absence of fashionable counsel, is received with loud applause by the junior bar.

Lord Birkenhead's Great Reform.

This year the long vacation has been anything but a barren period. While the law courts and the Temple have been steeped in their midsummer repose, Parliament has been putting upon the statute book one of the most momentous measures in the whole of our legal history—the Law of Property Act. The aim of this Act is to assimilate the law of real and personal property. Some of the reforms are simple, such as the amendment of the rules governing devolution on intestacy and the provision of much greater facilities for the sale of settled estates. To you in Canada, "settled estates" may sound like a ghostly voice from the Middle Ages, but they are very concrete realities

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here. It is still the custom for the estates of the landed gentry to be kept in the family by strict entail —the person in possession having only a life estate, his eldest son being the tenant-in-tail, and provision being made for pin-money, dower, portions for younger children, and all the other multitudinous details that enter into that masterpiece of the conveyancer, a strict settlement. When the eldest son comes of age, the entail is barred and the whole process is repeated by a new settlement

Though strict settlements may remain, Lord Birkenhead's new Act sweeps away innumerable technicalities and anomalies. It abolishes many rights and customs which successfully withstood every onset during the reforming frenzy of the nineteenth century. Copyhold, customary freehold, ancient demesne, and all other special tenures, are wiped out, and the Statute of Uses is repealed. For this last relief surely the law students and solicitors' clerks of the country will forever honour the name of Lord Birkenhead. At one stroke he has annihilated one of the most fearsome dragons that stood in the path of the budding lawyer. It is curious that the reform which, now it is accomplished, seems to have aroused no opposition, or indeed interest outside the legal professions, should not have been accomplished long since. Certainly it was not for lack of advocates.

The Hardest Commandment.

As long ago as 1906 that great authority, the late F. W. Maitland, handled this topic in a way that shows how jauntily an English professor can carry his load of learning:

> "Some of our ideas seem to be antiquated; some of our weapons I would liken to blunderbusses, apt to go off at the wrong end . . . There are some departments, large departments, of English law which seem to me thoroughly discreditable to us. I would mention in particular a great deal of what we call the Law of Real Property. It seems to me to be full of rules which no one would enact now-a-days unless he were in a lunatic asylum. And surely that should be the test. Would you enact that rule now-a-days? . . . There is much to be done; and I cannot say that our legislators seem inclined to do it, or even to be aware that it

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wants doing. I wish that Parliament could be persuaded to place itself for a while in the humble position of a teacher of English law—not for the sake of the teachers (they don't matter) but for the sake of the nation at large. I see our Land Law growing always a heavier burden. Almost yearly, Parliament adds something to the weight. Exceptions are piled on exceptions; but the old rules are never cleanly abolished. It was not always so. In the thirties of the last century, the days of the Radical Reform, some good destructive work was done; and destructive work is as necessary and as honourable as constructive. One of the primary functions of a legislature is, I conceive, to sweep into the dustbin the rubbish that inevitably accumulates in the course of legal history. We cannot, I fear, affirm that Parliament adequately performs this scavenger's task; and, from the very nature of the case, it cannot be performed by the judges. Much they can do, in the way of accumulating old law to new wants; but they never can say that the old rule is rubbish and must go to the dustbin. Yet that is what someone ought to be saying, sternly and effectually. Next year there will be more new Acts to read; but still we shall be expounding mediæval doctrine, and a thrice-accursed statute of Henry VIII. We drag an ever-lengthening chain. Parliament, it is true, goes about with its spud, digging up a plaintain here and a plaintain there. But it never drops sulphuric acid into the hole; and a little sulphuric acid is what we want. It is not of lack of zeal that we have to complain, nor of lack of knowledge; but there is apparently some lack of imagination. People do not see what I fear is the truth, namely, that our Land Law as a whole is becoming a more intricate labyrinth every year, owing to the improvements that Parliament makes in it. To this we must add that a great deal of the work that should be done is unattractive to our Parliament men, because it would bring them little applause or none. It is the old tale. If the prophet bade them do some great thing, they would do it; but 'Just you clean up this here mess' is the hardest of all commandments. I suppose we shall, as the phrase goes, 'muddle along' somehow, and show our practicality by passing some more of those timid and half-hearted Acts about the transfer of land which are monuments of futility."

That may not be up to the literary standard of Dickens, but it is not bad for a Downing Professor of English Law at Cambridge. And there has certainly been nothing timid or half-hearted about the way Lord Birkenhead has at last hewn his way through the labyrinth and poured sulphuric acid into the spud-holes.

Effect of the Act.

In Lincoln's Inn, the hive of conveyancers, there is much speculation on the probable effect of the Act. The equity lawyers feel they will be sailing in uncharted seas and that at first they will probably be

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very busy with new points which the Act is bound to raise. There is bound to be a good deal of clarifying litigation, if I may use that term, during the next few years; but no one doubts that the ultimate effect of the Act will be so to simplify the law as to remove the need for much of the conveyancing now done and materially to reduce the number of real property disputes. The profession will fortunately have time to digest the Act thoroughly before it comes into operation on the 1st January, 1925. The Council of Legal Education has promptly arranged for a special course of lectures on the Act by Mr. A. F. Topham, K.C., who is a recognized authority on Real Property. Both professions are already taking a great interest in the new law, which will probably affect the daily work of solicitors and Chancery barristers more than any statute of the last three centuries.

The Act has not introduced compulsory registration, although it has paved the way for it if it should be desired later on. The current of opinion seems, however, to be rather strongly set against compulsion. The Act is to be tried for ten years, and then registration may be made compulsory by order-in-council, but only after an inquiry and a debate in both houses of Parliament. Professional feeling was recently well expressed by the President of the Law Society, who said: "If this new Act is properly worked, any further extension of registration with its attendant satellites — officialism, publicity and red tapeism — should neither be possible nor probable."

In thus crowning the work of several of his predecessors, Lord Birkenhead has assured for himself a distinguished place in legal history. His achievement, however, has been almost unnoticed by the general public; and if the Government were to go to the country to-morrow, it would probably neither gain nor lose a single vote because it has put the Law of Property Act on the statute book. The public apathy is disappointing, but it has this comfort: once more it has been demonstrated that English lawyers have the will to embark on thorough reform of the law, without

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the spur of popular agitation. The work has been done unobtrusively, and the public indifference has resulted in a bill not marred, as are so many promising attempts at reform, by illogical amendments and ill-advised compromises during its passage through Parliament.

Legal Reform from Within.

Lord Birkenhead's Act is just one more proof, if further proof were needed, that English lawyers are always ready to carry out reforms long before the need for them is recognized by those outside the profession. Their reforming zeal has long been the admiration of the English-speaking legal world. The delays, the expense, and interminable appeals that discredit the administration of criminal law in the United States, have never been known in this country; and it was only the other day that Chief Justice Taft came over here to study the methods by which the mills of justice were made to grind so swiftly in England. But it is no new thing for America to look to England for a lead in matters of legal reform. Even the current statute books, not only of the United States but of Canada, Australia and New Zealand, are full of legislation which has been copied, often with very little alteration, from the statute book of England. For every legal reform which England adopts from an outside source, there are scores which the outside world adopts from her.

At first sight it may seem that the passing of the Law of Property Act is a most inappropriate occasion for speaking of the reforming zeal of English lawyers—for how many decades ago is it that the Torrens system of land registration was originated in South Australia? And how many more years will it be before England will have the courage to follow the other parts of the Empire in adopting that system? But English lawyers are the last people in the country who can be blamed for the delay in reforming the laws of real property. In the middle of the last century Lord St. Leonards, who, as plain Mr. Sugden, had

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achieved fame at the bar by his mastery of this branch of the law, did his best to anticipate Lord Birkenhead, but all his efforts were blocked by the great land-owning interests which were then supreme in Parliament. In nearly every other instance where Legal Reform has seemed to linger on the way, there is some similar explanation of the delay. It must in frankness be admitted that the solicitor branch of the profession is, as a rule, intensely conservative; but the higher branch, from which the Lord Chancellors, the Judges, and the Law Officers of the Crown are drawn, has almost always in our day shown a commendable readiness to welcome and adopt improved legal methods.

The New Term.

The cause lists for the new term are not yet published, but it is understood that there are over one thousand actions down for trial in the King's Bench Division, nearly two-thirds of which will be non-jury cases. Among the actions in the jury list there are at least twenty-four for libel and seven for breach of promise. The Commercial Court has a prospect of being kept more busy than it has ever been since it was first established by Mr. Justice Mathew (afterwards Lord Justice), for there are already nearly a hundred cases down for hearing. On the other hand, there are only 888 suits in the divorce list, as compared with 1,014 at the opening of the last legal year.

The Judicial Committee of the Privy Council will not sit till 23rd October, when it will have before it a list of thirty-six appeals. Five of these come from Canada, twenty-six from India, two from New Zealand, and one each from New South Wales, Straits Settlement, and Ceylon. As you are aware, some of the Canadian appeals raise very important questions, and the Board has also to give its reasons for advising His Majesty to dismiss the appeal of the Grand Trunk Railway against the recent award of the arbitrators.

3 Dr. Johnson's Buildings,
Temple, London E.C. 4.

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NOTABLE CASES NOTATED.

Mortgagor and Mortgagee of Script for Shares—Sale —Validity and Motive.

Beeton v. *Bass et al.*[1] In this case B.J.B. mortgaged certain shares in a Brewery Company. The Mortgagees had full power of Sale; and in 1914 they were anxious to give an option to F.R.G. to purchase them at a future date. They were advised this was impossible. They then sold to F.R.G.; advanced him the entire price, and gave him a right to call on them to repurchase at the same price before 1st May, 1917. The purchase price so advanced was secured by a deposit of the Script and by a Promissory Note payable on demand. The price, however, was repaid before that date by F.R.G. who then sold the shares at an increased price. The original Mortgagor B.J.B. brought an action claiming a right of redemption on the ground that the Sale was not a *bona fide* Sale.

These are briefly the facts, but the case is surrounded with a vast array of extraneous complications which involved the doctrine of consolidation, the motives of a Mortgagee in realizing, by sale, his security, and the verities of a Sale, whether it was a real Sale or only an option.

Mr. Justice Russell's judgment is, as usual, luminous and logical.

He reviews the right of a Mortgagee to make a Sale on the terms of allowing a considerable part of the purchase money to lie out upon the security of the property sold, quoting *Davey* v. *Durrant*,[2] *Farrar* v. *Farrars, Ltd.*[3] and other cases, and decides that a Mortgagee may effect a Sale on the terms of allowing all the purchase money to outstand on Mortgage. But of course the new Mortgage would be to the former Mortgagee in quite a different capacity—his

[1] (1922) 2 Ch. p. 449.
[2] (1857) 1 De G. & J. 535, 553.
[3] (1880) 40 Ch. D. 395.

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personal capacity. The original Mortgagor would have to get the purchase price as fixed, or get credit for it as was done in this case. And that price would more likely be enhanced than depreciated by such a Sale.

In dealing with the question of the motives actuating a Mortgagee making a Sale, Mr. Justice Russell referred to *Robertson* v. *Norris*,[4] where Stuart, V.C., attributed to Lord Eldon in the case of *Nash* v. *Eads*,[5] the statement that the Mortgagee is a Trustee for the benefit of the Mortgagor in the exercise of the power of Sale, and that if he used the power for any purpose other than securing payment that would be a fraud on the power. Mr. Justice Russell explained that what Sir George Jessel did say was that "the Mortgagee was not a Trustee of the power of Sale, and so long as he was entitled to exercise his power when he did so, the Court could not look into his motive for so doing." He might sell or refrain from selling for any personal reason that might actuate him so long as he had the right to sell.

To prevent any confusion, however, Mr. Justice Russell added that of course there are limits to the power of the Mortgagee—the proper conduct of the sale, for instance; the price must be fair, and the inability to sell to himself.

The construction of the original Mortgage also presented difficulties. But the learned Judge was able to do this without resorting to the *Watcham* v. *East Africa Protectorate*,[6] which according to the argument of Mr. Romer, K.C., lays it down that "if there is ambiguity, patent or latent, in a Deed, the parties can be examined in order to correctly interpret its meaning."

How far this case is an authority for this proposition I intend to examine at a future date.

[4] 1 Giff. 421, 424.
[5] 25 Sol. J. 95.
[6] (1919) A. C. 533.

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Sale of Goods Act—Warranty—Implied Condition of Fitness.

The case of *Manchester Liners Limited* v. *Rea Limited*,[1] is one of the most recent important cases decided by the House of Lords upon Section 14 of the Sale of Goods Act, which has its complete reproduction in the Sale of Goods Act of every Province of Canada which has adopted the English enactment. It is as follows:—

"Subject to the provisions of this Act, and of any Statute in that behalf, there is no implied warranty or condition as to quality or fitness for any particular purpose of goods supplied under a Contract of Sale, except as follows: (1) Where the buyer expressly, or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a descriptioon which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose."

The corresponding Canadian Sections are easily found.

The facts were: The Plaintiffs were shippers and owned the steamer Manchester Importer. The Defendants were Coal Merchants and supplied coal for bunkering steamers. It was agreed between the agents of the respective parties that the Defendants should supply to the Plaintiffs 500 tons of South Wales Coal for bunkering the steamer Manchester Importer. The coal supplied was not according to the Plaintiffs fit for the purpose intended by reason whereof the Manchester Importer after putting out to sea had to return and unload the coal. The Plaintiffs said they relied on the Defendants' skill and judgment to supply coal fit for the Manchester Importer, which was a natural draught steamer to the knowledge of the Defendants. The Defendants pleaded that the coal answered the description; and also that the only coal available when the contract was made was coal requisitioned by the Coal Controller; and that it was an implied condition that the coal sup-

[1] Vol. 127 L. T. R., p. 405.

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plied should be coal so requisitioned and made available for bunkering purposes. That the 500 tons supplied formed part of such coal, and that no other warranty was implied on the sale of the 500 tons except that such coal had been requisitioned by the Coal Controller and made available for bunkering.

Mr. Justice Salter held the coal was not reasonably fit for the purpose of being used to drive an average natural draught steamer like the Manchester Importer; and that there was no evidence of knowledge by the Plaintiffs as to the restricted source of supply alleged by the Defendants. The obligation was to deliver suitable coal for the particular vessel where it was to be used.

The Court of Appeal reversed this.

On Appeal to the House of Lords Sir John Simon for Defendants stressed the allegation that at the time of the Contract the circumstances were such as to prevent the Defendants from exercising skill or judgment by any selection of the coal to be supplied and that such circumstances were known to the Plaintiffs. The Defendants had not committed a breach of the Contract. The House of Lords, consisting of Lords Buckmaster, Dunedin, Atkinson, Sumner and Carson, were unanimous; and, reversing the Court of Appeal, restored the Judgment of Mr. Justice Salter on the ground that if goods are ordered for a specific purpose and that purpose is disclosed to the vendor so that, in accepting the Contract, he undertakes to supply goods which are suitable for the object required, such a Contract is sufficient to establish that the buyer has shown that he relies on the skill and judgment of the seller.

Lord Buckmaster said (*inter alia*):—

"It is plain that the order was expressed for the use of a particular steamer, and it must, therefore, be assumed that the defendants knew the nature of its furnaces and the character of the coal she used, for it was this character of coal they contracted to supply."

When discussing the Defendants' argument that no warranty is implied unless the buyer expressly or by

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implication makes known to the seller the particular purpose for which the goods are required so as to show the buyer relies on the seller's skill and judgment, and that this the order failed to effect, Lord Buckmaster said:—

"This in my opinion is a misunderstanding of the Statute; for the section embraces and restates the Common Law doctrine in the form which was clearly derived from *Jones* v. *Just*.[1] If goods are ordered for a special purpose, and that purpose is disclosed to the Vendor so that in accepting the Contract he undertakes to supply the goods which are suitable for the object required, such a Contract is, in my opinion, sufficient to establish that the buyer has shown he relies on the seller's skill and judgment.

"The view taken by Lord Russell in *Gillespie* v. *Cheney, Eggar & Co.*,[2] appears slightly at variance with this conclusion, though the result is the same; for he regards the Common Law as partly remaining outside. In my opinion, the section completely incorporates the Common Law and in no way limits its operation."

N.B.—This is a very interesting point: How far the Sale of Goods Act completely incorporated the Common Law. Does it, as Lord Russell said in the case referred to, leave some part of the Common Law still outside the Statute; or does it, as Lord Buckmaster says, completely incorporate the Common Law? We hope to expound this more fully at a future date. At present it is enough to know, or say, that we can look at the Common Law so as to interpret the Statute; and in this way we may get a wider construction than the *prima facie* meaning of the words of the Act would warrant or justify. But whether the Act is in Canada, as it is in England, a codifying Act is another question to be determined in each Province. The English Act is called an "Act to Codify." The Acts in Canada are simply called "Sale of Goods" Acts. The effect of the interpretation might, owing to this difference, cause all sorts of divergences and baffle the desire of uniformity.

If uniformity was the aim of these enactments why was there not also uniformity in the name? A craving for originality!!

[1] 18 L. T. Rep. 208; L. Rep. 3 Q.B. 197.
[2] (1896) 2 Q. B. D. 59.

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Bailment of Motor Car—Liability for Negligence of Bailee's Servants.

Rutter v. *Palmer*[10] is an important case decided by the Court of Appeal on the liability of Bailees of Motor Cars. The Plaintiff claimed to recover damages for injuries to his Motor Car while in the custody of the Defendant, a Motor Car Dealer at Tooting. The Plaintiff had placed the car with the Defendant at his Garage to be sold on Commission upon conditions contained in a deposit note dated 7th February, 1920. The relevant clause of the note reads: "Unless you (*i.e.*, the Defendant) give a receipt for the goods stating the same to have been delivered to you in perfect condition in every respect you will not be responsible for any damage whatever for the goods while in your possession, and Customer's cars are driven by your Staff at Customer's sole risk."

On February 10th, three days after the deposit, a driver in the employ of the Defendant was taking the Motor Car to show it to a likely buyer. It was fitted with smooth tires. The road being greasy the wheels skidded along the train track and the Motor Car collided with an Electric Standard and sustained damage.

The Lord Chief Justice held the damage was caused through want of reasonable care and skill on the part of Defendant's driver. But the Defendant claimed he was free from liability by reason of the condition set forth in the Deposit Note. The Chief Justice held however that as Bailee he was bound to take reasonable care, and use reasonable skill, and that the conditions did not relieve him from responsibility arising from the negligence of his servants.

This ruling or decision the Court of Appeal consisting of Bankes, Scrutton and Atkin, L.J.J., reversed, holding that the conditions or clauses in the Deposit Note were introduced so as to relieve the Bailee or Defendant from liability owing to the negligent acts of his servants committed in the course of

[10] 127 L. T. R., p. 419.

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their employment or duty as regular drivers, and that the Defendant was not liable for the damage to the car.

Bankes, L.J., said that the basis of the Lord Chief Justice's decision was the dictum of Kennedy, L.J., in *Travers* v. *Cooper;*[11] but upon consideration he was satisfied the Contract in this case was a special one referring to a particular purpose and is to be distinguished from a Contract of carriage by a Railway Company or a Common Carrier. The latter are liable for acts of servants whether they are negligent or not; whereas an ordinary bailee for work and labour is not liable for the acts of servants unless they are negligent. A Common Carrier who wishes to protect himself from all responsibility for damages for all acts of his servants must make use of words which will include acts of negligence; because words which would be sufficient to protect him from liability for acts properly done by servants in the course of their employment might not suffice to free him from liability when the acts were acts of negligence on the part of his servants. He said further if a bailee uses words applicable to the acts of his servants these words will as a rule cover acts of negligence, as he is liable only for acts of negligence, otherwise these words would be superfluous and have no effect.

He then proceeded to apply these principles of construction to the present case and decided as we have stated—holding that the clause "Customers' cars are driven by your (Bailee's) Staff at Customer's sole risk," saved the Bailee so long as the car was driven by one of the Staff whose duty it was to drive Motor Cars; and that whether the injury arose from negligence of the driver or not the Bailee was under the Contract free from liability.

Workmen's Compensation Acts.

The judgment of the Court of Appeal in the case of *Reid* v. *British and Irish Steam Packet Co.*[12] deals

[11] (1915) 1 K. B. 73.
[12] (1921) 2 K. B. 319.

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with three points under the Workmen's Compensation Act—the familiar riddle whether the accident was one arising out of the employment; the question yet again whether the person injured was one "employed otherwise than by way of manual labour"; and whether the employee's remuneration exceeded, or did not, £250 a year. Reid, the applicant for compensation, was employed by the respondents at their wharf as a quarry foreman, his duty consisting in the supervision and control of the dock labourers. In the words of the Master of the Rolls, there was evidence that these men "were a rough lot and probably anybody who has experience of dock labourers would think that was not, at any rate manifestly, an untrue description." One day, while in the discharge of his duties, Reid gave orders to one of the men to perform some work which he ought to have done. For no obvious reason, the man violently assaulted him, and inflicted a serious injury to one of his eyes, so that for all practical purposes he lost the sight of it and, the sight of his other eye being already defective, he was totally incapacitated from performing the work on which he had been employed. The County Court judge decided that the injury to the applicant was caused by an accident arising out of his employment. The Court of Appeal were of the same opinion. They took the view expressed by the majority of the noble and learned lords who delivered judgment in the case of *The Trim Joint District School* v. *Kelly*,[18] that that matter was a question of fact and a question of degree to be decided in each particular case. In that case the man, who was killed by a preconcerted attack, was a schoolmaster in an industrial school. There had been assaults before in the school, and several of the boys were rough and unruly. Acts of violence deliberately intended to injure, though not accidents from the point of view of the person who inflicts the injury, may be accidents from the point of view of the person who suffers the injury; and it is a question of

[18] (1914) A. C. 667.

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fact whether the risk of assault is merely one which is common to any subject of His Majesty equally with the person who has suffered it, or whether there is some special risk of assault to the particular person arising from his employment. There was evidence from which the County Court judge could find that there is a special risk of assault to a foreman of dock gangs on the Thames: "If, as a judge," said Scrutton, L.J., "I am allowed to use my own knowledge, I should entirely agree, from my knowledge of dockers, with the finding of the County Court judge." The Court of Appeal, however, held, on the second and third points above mentioned, that Reid was not a "workman" within the meaning of section 13 of the Act, in which the term is defined not to include "any person employed otherwise than by way of manual labour whose remuneration exceeds £250 a year." Following the definition adopted by the Court of Appeal in *Jaques* v. *Owners of Tug "Alexandra"* (an unreported case) to the effect that the question whether a person employed otherwise than by way of manual labour is to be determined by whether any manual labour which he may do in the course of his service is the real substantial work for which he is engaged, or whether it is only incidental and accessory thereto—the Court held that Reid was not engaged to do manual work, although he sometimes "gave a hand" when they were pressed. As to salary, this man was earning £21 a month, and would have continued at that until his employment was terminated by one month's notice. The Court of Appeal distinguished the cases of *Griffith* v. *Owners of "Penrhyn Castle,"*[14] and *McKay* v. *Owners of the "Cramond,"*[15] in which there was not continuous employment and no real ground for expecting that the payments would continue; and they held that Reid's remuneration clearly exceeded the statutory £250 a year, the fact that the employment might be ended by

[14] (1917) 1 K. B. 474.
[15] (1920) W. C. & Ins. Rep. 219.

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a month's notice notwithstanding. He had been in the respondents' employment for over twenty years, and they were thoroughly satisfied with him; there was every human probability that the employment would go on, and would not be terminated by notice.

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BOOK REVIEWS.

The Problem of Proof, Especially as Exemplified in Disputed Document Trials. By Albert S. Osborn, Author of "Questioned Documents," with an Introduction by Professor John Henry Wigmore, Author of Wigmore on Evidence. New York: Matthew Bender & Company Incorporated. Toronto: The Carswell Company, Limited.

Over all the Books it has been my duty or pleasure to review, the "Problem of Proof as Exemplified in Disputed Document Trials" has afforded me a surpassing mental exaltation. It is a permanent uplift, and not a mere transitory gratification, and I feel certain a correspondent result will be experienced by every reader of Mr. Osborn's Book.

As stated by Professor Wigmore, the Author of the celebrated work, "Wigmore on Evidence," Mr. Osborn's Book is immensely greater than its title would indicate. It does not deal merely with the Evidence on disputed Document Trials, though it treats that subject in a manner which displays not only a familiarity with, or, rather a mastery of, the orthodox or stereotyped conceptions, but an originality which is truly exhilarating. This originality runs through every Chapter of the Book and leaves the Reader with newer and higher aspects of the problems confronting him and of the Lawyer and his functions.

Mr. Osborn is not only an original thinker, he fearlessly expresses the result of his thinking in language which is as lucid and clear as the thoughts which it conveys. He is, in fact, a great Teacher, but he imparts what he has to convey not so much by way of didactics as of inspiration. He is emphatically an advocate of thoroughness in the Lawyer from the Chapter on "Preparation on the Facts" to the end of the Book. He drives home at every turn this great truth—that it is work and not the spontaneity of genius, even when it exists, which makes the successful advocate. Besides that he directs, in a manner we have seldom seen excelled, the lines upon which the advocate should

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work in achieving success. The Chapters on Sifting the Evidence and on Standards of Comparison are treasure-houses of suggestion, advice, and guiding skill. Indeed the same may be said of all the other Chapters in which the various elements of Proof are discussed—the Chapters, for instance, on the Aid of the Specialist, the Specialist as a Witness, Co-operation between Advocate and Expert Witness, and other Chapters. To discuss any of them on its individual merits would be invidious, for each is itself unique as a masterpiece. And here it may be said that while the Work is a unity each Chapter is an entity complete in itself upon the particular theme it discusses.

From Chapter X. on "Incidental Argument and the Lawyer's Words," Mr. Osborn is gradually trending upwards to what Professor Wigmore calls the "Climax of the Book," which he says is found in Chapter XV. on Advocacy. With deference we suggest the climax is only complete with Chapter XVI., which deals with "Persuasion and Practical Psychology in Courts of Law." We must pause here and say, that these Chapters should first be read by anyone approaching the Book with any vague idea collected or imparted from its title that its range or scope is one of merely formal Evidence or Proof. These Chapters strike the note of the true worth and greatness of Mr. Osborn's work.

Throughout the whole Work on every subject dealt with the theme is the Advocate, his place in the Forum of Justice and his duties, rights, and obligations to his client, to the Court, and to himself. Mr. Osborn seems to stand in the centre of an arena observing its laxities, ineptitudes, defects, and perversions, but, drawing inspiration from an ethical source, uttering, at the same time, oracular words of cleansing, purification and regeneration for the on-coming years in the dispensation of a Justice commensurate with the needs of the time. Scathing are his denunciations alike of the incompetent lawyer, the lazy genius, the charlatan, and the criminal; and his descriptive language of

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them, their tricks, devices, and chicane, is truly pen-pictures of realities met with and known by every practitioner of the Law.

Mr. Osborn, while imparting unrivalled knowledge, guidance, and wisdom upon the diversified array of subjects discussed, is a continual uplifting force throughout the Book to the Profession of the Law. His exhortations to honour, integrity, and to the unvarying display of the attributes of a "Gentleman," are worthy of the most illustrious Lawyers in the halcyon days of Greece and Rome and even of England herself in the period of her undimmed splendour —the Victorian era.

To every Student who aspires to be truly a great Lawyer with the moral character and attributes which Mr. Osborn says are indispensable to greatness; and to every Lawyer who regards his Profession as something more than a money-making craft, who regards himself as a potential participant in the ascertainment and vindication of Right and Justice and Truth, and who recognizes that for the attainment of the highest ideals he must be free from taint and corruption and unamenable to the snares, devices, or intrigues of others whether for the purpose of winning a cause or of discomfiting an antagonist, we say, and say with fervour and firm faith in the result, read this great Work by Mr. Osborn. You will forever benefit and never regret compliance with this exhortation.

B. T.

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The Canadian Law Times.

VOL. XLII. TORONTO, DECEMBER, 1922. No. 12

EDITORIAL.

The Passing of the CANADIAN LAW TIMES.

Whether to write an Epitaph for the CANADIAN LAW TIMES or a Valedictory for its Editor confronted me as a conundrum for this the last issue of its forty-second year of publication. First I thought of avoiding difficulty by fusing the sentiments of both. But second thoughts—and they are always best—constrained me to desist altogether lest, peradventure, the Phoenix should be destined to re-emerge from the ashes of its pyre in revivified and rejuvenated splendour. I am not a seer and do not pretend to forecast eventualities. So I forbear; but at the same time a few thoughts will be opportune on the present occasion.

For 42 years the CANADIAN LAW TIMES has played a conspicuous part in Canada's legal history and development. It has served great purposes and achieved great objects; and it has kept a continuous connection between the Members of the Legal Profession from the Atlantic to the Pacific. Its light was constantly reflected from some of Canada's brightest minds; and it has had as Editors such distinguished men as the late Mr. E. D. Armour, K.C., and Professor Lefroy, K.C. Their work is enduring to-day, and it will endure while Canada continues to progress.

Of myself I will only say that in the three years of my Editorship I have discussed Canada's greatest problems, not only those of her Law but of her Con-

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stitution, and have never shrunk from clarifying obscurities and assailing misconceptions wherever I have found them. I have never glided easily with the current, but have, on the contrary, nearly always found myself struggling up-stream to original sources of light and knowledge, though obstructed at every turn by accumulated masses of preconceptions and assumptions which had mystified and distorted the true perspective of the present and past generations. These obstructions I removed often by arduous effort. But while I demolished, I was not merely an iconoclast. I left nothing in debris; but collected and readjusted the material of the disintegrated mass, whatever it was, and promptly reconstructed out of it on the same *situs* a new fabric based not on the shifting sands of quixotic notions but on adamantine principles of Right and Justice.

Whatever I found to do I did it with all my might; and it certainly was not my work to merely elaborate the ideas of others or to merely clothe accepted notions with a fresh or ornate diction. I penetrated the notions themselves, and revealed the Truth which often lay hidden or obscured behind or within them fortified by prejudices and preconceptions. Nor did I debate for debating sake, or argue merely to display ingenuity. I was intent on achievements for the public good, and if they will allow me to say so, for the good of the Legal Profession themselves. Sometimes, it may be, my intentions were coloured by my vehemence; and those who were displaced from niches of self-satisfied composure may have thought my attitude a little more dogmatic than didactic. But I did not write merely to please people. My mind was ever intent on recondite principles and on the general weal; and a mind in that attitude thinks nothing of individuals. If it did it would paralyse itself.

Whatever I have done stands on record in the volumes of the CANADIAN LAW TIMES from 1917 onward, though the last three years only reflect my Editorship. I am content to leave the verdict on it to my contem-

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poraries who have honoured the CANADIAN LAW TIMES by reading it. The strenuous and persistent efforts I have put forth to induce the Canadian Bar Association to publish a Journal of its own are well known to the readers of the CANADIAN LAW TIMES. The results have been accelerated or rather precipitated beyond my wildest dreams; but they have turned out contrary to my own anticipations.

To the bountiful generosity of the Honorable Sir James Aikins, K.C., Lieutenant-Governor of Manitoba, alone is due the sudden ability of the Canadian Bar Association to carry into effect its present project; and I will not attempt to pass a prophetic panegyric on its new Law Review. Nor, in spite of what I have stated, will I prophetically condemn it. It is *de facto* a new Journal and must justify itself by its works and not by professions. It has no transmitted inheritance from the achievements of the CANADIAN LAW TIMES except the inheritance of great expectations which the CANADIAN LAW TIMES created for itself in the minds of its readers who were constantly anticipating what new mine the coming issue would unfold. Seldom for three years past have they been disappointed.

To the Carswell Company, Limited, is due a word or two of grateful acknowledgment for the faithfulness with which they adhered through many difficulties to an ideal ever since 1880 of supplying to the Members of the Legal Profession in Canada a monthly Magazine in which they could express and interchange their views and conceptions not only on the Law and its development or its obscurities, but upon the advisable methods of uplifting and ameliorating the Profession itself. The Profession should have responded to such a splendid conception by every Member becoming a Subscriber to the CANADIAN LAW TIMES; and by those who had the gift contributing articles of value to their brethren. The response of the Profession was never commensurate with the devotion to their ideal of the Publishers; and I doubt whether

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during the last few years of augmented cost in production the Publishers were justified, on financial considerations alone, in continuing the publication of the Magazine. But they did so; and for my part I did all it was possible to do to popularize the CANADIAN LAW TIMES; and if one is to judge by the subscription list it never was so popular as it is on the eve of its extinction. To all I say *Revoir: Resurgam.*

BRAM THOMPSON.

7th December, 1922.

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WHAT IS A MORATORIUM?

By Bram Thompson, Barrister, Regina.

A phrase, particularly if it is a foreign phrase, is often one of the most fertile sources of self-delusion. If the evil of it stopped there, it would not be very serious; but unfortunately self-delusion is contagious —it spreads to others; and more unfortunately still the misinterpretation of a phrase without producing any self-delusion at all on the interpreter, is used by him to delude others. In this way the public are projected upon courses which are false, and entail frequently a long penitential retracement after the Machiavelli of the scheme has achieved or attained his own objective or ambition.

Precisely the same thing may be said of a word, particularly if it is a substantive word with an inherent literal meaning, but also with an acquired scientific definition which confines its application to certain conditions or phenomena. Moratorium is such a word.

Since 1914 the word "Moratorium" has come into frequent use. During the War it was in the daily nomenclature of the street; and within the past year or two every pot-stick politician has been holding it forth as the panacea for all the misfortunes which have followed, not as a consequence of, but in the tracks of the War—crop failures, scarcity of employment, want of money *ad infinitum*.

"Pass a Moratorium Law" has rung all over Canada, particularly in the Wheat-growing West where for several years the crop hardly yielded enough to pay for the cost of production. The cry was, stop the aggressive creditor by a Moratorium. This year there has been an interruption of the cry by a bountiful crop, surpassing any ever previously reaped. The cry for a Moratorium has consequently ceased; but as it may reascend with a recurrence, per-

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haps, next year of the conditions, we take the opportunity of discussing what a Moratorium is in Law, and what the legislative power in Canada is, to enact such a measure.

A Moratorium is simply a Law to delay the exercise of some right which in the absence of the Moratorium would be in complete operation. The right of a creditor to sue for and, by process of law, to recover his debt is such a right. A measure to suspend or interrupt this right is in euphonious parlance called a Moratorium perhaps for some of the reasons discussed in the opening paragraph of this Article—self-delusion or as a convenient instrument for deluding others. There is no mystery and much less magic in the word; and neither it nor the conception it imports has any place in the Civil Law of this Country apart from the Law of the Civil Right of the individual to his property, his liberty and all that pertains to him as a citizen under the British Constitution.

The right of an individual may be suspended or demolished in the interest of the Community or the right of a Community may be suppressed in the interest of the State. In other words, private right has to yield to public law in the interest of good Government. But the right of the individual can not be suspended or destroyed captiously, and merely in the interest of another individual. The expediency or necessity of the public is an essential element in any impairment of a private right. The Legislature is not by any means supreme, nor can it, any more than could the autocratic King, convert itself into a tyrant and enact whatever it likes or whatever political expediency may dictate.

We have been safeguarded in this respect ever since the *Magna Charta* and the *Bill of Rights;* and it was solely because the public interest demanded it, and the voice of the people called for it, that the Legislatures of Canada have destroyed in this generation the rights of property of men engaged in the liquor

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trade and even the rights of individuals to drink a glass of beer as was their wont and the wont of their sires for centuries upon centuries of our history. Private right and individual liberty had to yield to public Law even though it effected confiscation on one hand, and imposed a tyranny on the other.

The voice of the people expressed in the Legislatures can again, in turn, restore the *status quo ante* or any modification of it.

In ordinary conditions there can be no question of a public interest which requires the suspension or interruption of the right of the Creditor to payment of his debt or of the obligation of the debtor to discharge his indebtedness. But in the time of War ordinary conditions do not prevail, and every Civil Right is subordinated to the necessities of the State. The consequences of this were, that enactments were made during the late War for suspending the rights of Creditors in recovering their debts from Debtors who had become Soldiers of the State. This was only just; but, generally speaking, even this suspension extended merely to debts or obligations arising out of contracts relating to land made by the Soldier before his enlistment or before the outbreak of the War. This limitation showed the wariness of the Legislatures in impairing or infringing Civil Rights.

All these enactments were called "Moratoria" or "Moratorium Law." They have passed away; but they have left behind an impression, or it may be a conviction, that any Provincial Legislature, merely because Section 92 of the B.N.A. Act, 1867, invests it with authority over "Property and Civil Rights," can at its own sweet will enact a measure to suspend the right of one individual to recover his legal debt from another. It is a mistaken notion. It is adverse to every conception of property and liberty in our Constitution.

The Legislatures of Canada must recognize that their powers are subject to, and controlled by, the great fundamentals of the British Constitution. The

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B.N.A. Act, 1867, an Imperial Enactment, is itself similarly controlled; and one of these great fundamentals is the *Magna Charta* which declares on the part of the Crown or Sovereign that:

> "To no one will we sell; to none will we deny or delay Right or Justice."

Are the Legislatures of the Provinces of Canada invested with authority to over-ride and disregard this great fundamental Law; and can they interrupt the right of a Creditor to recover his debt? They certainly cannot impair any private or individual Right unless the interest of the Province as a whole demands it; and that would require to be expressed by a vote of the people as a whole; for it was the people as a whole who wrung the concession and safeguard of their liberty or civil right embodied in the *Magna Charta* from Henry II. and other Norman Kings who ratified and endorsed it, and who had endeavoured to debase them into servile slaves of their autocratic tyranny. It is only the people as a whole who can part with the rights acquired under the Great Charter; and it is no more competent for the Provincial Legislatures to autocratically impair those rights in the interest of a section of the people than in the interest of an individual man. Nor is it competent for the Provincial Legislature, *mero motu,* to impose a tyranny over one class or section of the people merely at the behest of, or in the interest of, another.

It is in the interest of a section of the people—Farmers in certain belts or areas of land whose crops failing to adequately mature, have produced conditions of temporary insolvency—that the Legislatures of the Prairie Provinces have been proposing to enact a "Moratorium"—a Law to suspend the right of the Creditor to sue for his debt in the Courts, or to subject the right of suit to a precedent fiat of one of the Judges. If the Judge refuse the fiat, the right to sue is suspended; and both Justice and Right are

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denied and delayed contrary to the fundamentals of our Constitution—contrary to the express provisions of *Magna Charta*. Such a Law enacted by the Provincial Legislature would be *ultra vires* and void whether or not it was sanctioned by the people of the Province. Yet as I am not presenting merely *non possumus* dogmas, I proceed to explain that there is a remedy, if the position of the section of the people referred to is such that they cannot really and honourably pay their debts owing to climatic or any other conditions. They have, if in that position, to face the fact that they are insolvent; and it is competent for the Parliament of Canada under the B.N.A. Act, 1867, to enact an Insolvency Law of which they might avail themselves.

It is said there is no Insolvency Law so far enacted. But why not? Two wrongs—the apathy of the Dominion and the unwarranted zeal of the Province—cannot either make a right or destroy it. But right can be made and justice done to both debtor and creditor by the Provinces forcing the lethargic Dominion to exercise its function. The people themselves, if they are really the Sovereign people they claim to be, can compel the enactment of an adequate Law to meet the deplorable conditions which are represented as prevailing or periodically recurring in certain farming districts of the West. This year the crop results have in their profusion cast all previous years into the shade; and the conditions referred to do not really exist. Nevertheless this year there has been a stronger demand than ever before for a Moratorium—a Law to stay the Creditor from recovering his debt. This may arise from the circumstance that one good crop could not liquidate the accumulated indebtedness of three or four barren years. The business man, especially in big industrial centres, is liable to much the same periodic conditions; and unless he can make a pact with his Creditors he has to resort to the Law of Bankruptcy.

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For the Farmer there should be a Law of Insolvency enacted by the Parliament of Canada, of which he might avail himself when conditions confront him which make it impossible for him to liquidate his liabilities as they accrue due. It is only the Dominion Parliament which can enact such a law; and all attempts by the Provincial Legislatures at such legislation or at providing any circumventing scheme such as a Moratorium for staying the Creditor's right or for enabling the Farmer to evade payment of his debts as they accrue due are unconstitutional and utterly *ultra vires*. Insolvent conditions demand a Law for insolvents, and nothing else can ameliorate them.

It is the duty, then, of the Provincial Legislatures where periodic crop failures may produce recurrent conditions of temporary insolvency, to enforce upon the Dominion House of Parliament the absolute necessity of enacting an Insolvency Law of which, if necessity compel them, Farmers may avail themselves.

Such a measure would require draftsmanship of a high order with a minimum of sterile phraseologies and an abundance of rectifying and ameliorating provisions made in the interest of not only the insolvent Farmer but of the Creditor. Each of the Provinces of Manitoba, Saskatchewan, and Alberta should prepare, in unison, such a proposed Insolvency Law, endorse it by Resolution at the first Sitting of the Legislature and transmit it to the Government of the Dominion with a demand that it should be enacted at the first Sitting of the Parliament of Canada.

This is the way to establish Right; to demolish Wrong; to effect Amelioration; and to do Justice to all. Besides, this is the way to avert from the Provinces the odium of temporizing with proposals for abortive Moratorium Legislation.

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THE MODERN HISTORY OF THE DOCTRINE OF CONSIDERATION.[1]

By W. S. Holdsworth,[2] K.C., D.C.L.

(Continued from November issue)

(3) CONSIDERATION MAY BE EXECUTORY OR EXECUTED, BUT IT CANNOT BE PAST.

The terms executed and executory are obviously apt terms to describe the cases when the consideration for a promise has been fulfilled and where it has not. They were applied to express this difference between considerations in 1597, though not in connection with the law of contract;[4] and, as soon as the scope of assumpsit was extended so that by it wholly executory contracts could be enforced, they begin to be used to express this difference between the kinds of consideration which will validate a simple contract.[5]

Before this date, however, the lawyers had begun to have some perception of the difference between what we now call an executed and a past consideration. Assumpsit lay upon a contract where a detriment had been actually incurred by the promisee, before it was

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[4] *Barwick's Case*, 5 Co. Rep. at f 94a.

[5] In *Sidenham and Worlington's Case* (1585), 2 Leo. at p. 225 Periam J. uses the term executed in the sense of past; and in *Docket* v. *Voyal* (1602) Cro. Eliza. 885 the terms past and executed are used as synonymous; but in *Lampleigh* v. *Brathwait* (1616), Hob. at p. 106 an executed consideration which is incorporated with the promise is distinguished from a past consideration which, not being so incorporated, does not validate a contract; the fact that the term 'executed' then and later was used as a synonym for 'past' has tended to confuse this topic; cp. Street, op. cit. ii, 83.

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extended to enforce a wholly executory contract; and, except in the case of the contract of sale, Debt would not lie unless a quid pro quo had been actually received by the defendant. The lawyers therefore were obliged to discriminate between the performance of an act which would support a promise, and the performance of an act which would not. Thus they were obliged to recognize the rule that the gift of the quid pro quo or the incurring of the detriment must be so connected with the promise that they formed substantially one transaction. In other words, the distinction between an executed consideration which would, and a past consideration which would not support a promise, had been forced upon their attention—in connection both with the action of debt and the action of assumpsit. It is clear that St. Germain considered that a promise given in return for a wholly past act not done in contemplation of the promise, though it might create a moral obligation, could not be united with the promise so as to make the promise actionable.[6]

This principle was laid down in the case of *Andrew* v. *Boughey*[7] in 1553, and it was made the basis of the decision of *Hunt* v. *Bate* in 1568.[8] In that case the servant of A had been arrested, and B had bailed him. A in conideration of this action by B had promised to indemnify him. It was held that no action lay upon this promise because the consideration for it was wholly past; but that it would have been otherwise if the act done by the plaintiff had been done at the request of the defendant.[9] In 1585 in *Sidenham and*

[6] "*Doctor.* But what hold they if the promise be made for a thing past, as I promise thee xl li. for that thou hast builded me such a house, lyeth an action then? *Student.* They suppose nay, but he shall be bound in conscience to perform it after his intent." Bk. II c. 24.

[7] "Here the warrant and promise of the goodness of the wax was void and of no force in law, because it was not made immediately upon the contract but a month after", Dyer at f. 76a.

[8] Dyer, f. 272a; the note to that case contains a valuable collection of sixteenth and early seventeenth century cases which show that the distinction between a past and an executed consideration was well understood.

[9] "By the opinion of the Court it (the action) does not lie in this matter, because there is no consideration wherefore the defendant should be charged for the debt of his servant, unless the master had first promised

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Worlington's Case[10] the distinction was laid down in almost modern fashion by Rhodes J.[11]: "If one serve me for a year and hath nothing for his service, and afterwards at the end of a year I promise him 20 pounds for his good and faithful service, he may have and maintain an action upon the case upon the same promise, for it is made upon a good consideration; but if a servant hath wages given him, and his master *ex abundanti,* doth promise him 10 pounds more after his service ended, he shall not maintain an action for that 10 pounds upon the said promise; for there is not any new cause or consideration preceding the promise." In 1638 Jones and Croke, J.J., in the case of *Townsend* v. *Hunt*, made a very similar statement.[12] Clearly this view of the law facilitated the adaptation of assumpsit to the sphere of applied contracts. If A does work or performs a service for B at B's request, the work or the service can be regarded as an executed consideration which will support a promise to pay.

It is clear from these and other cases that the lawyers were fixing upon the fact that the service was done by the plaintiff at the request of the defendant as the feature which differentiated an executed from a past consideration. Thus we have seen that in *Hunt* v. *Bate* it was said that if the master had first requested the plaintiff to bail his servant it would have made all the difference.[13] This distinction was approved by Periam[14] and Rhodes, JJ.,[15] in *Sidenham and*

to discharge the plaintiff before the enlargement and mainprize made of his servant, for the master did never make request to the plaintiff for his servant to do so much, but he did it of his own head. But in another like action on the case brought upon a promise of twenty pounds made to the plaintiff by the defendant in consideration that the plaintiff, at the special instance of the said defendant, had taken to wife the cousin of the defendant, that was good cause, although the marriage was executed and past before the undertaking and promise, because the marriage ensued (upon) the request of the defendant," *ibid.* at ff. 272a, 272b.

[10] 2 Leo. 224.

[11] *Ibid.* at p. 225.

[12] Cro. Car. 408-9, cited below n.; cp. also *Marsh and Rainsford's Case* (1588) 2 Leo. 111.

[13] Above, 175 n. 4.

[14] 2 Leo. at p. 225.

[15] *Ibid.*

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Worlington's Case, and was clearly stated in its accepted form in 1616 in the well known case of *Lampleigh* v. *Brathwait*[16]—"a meer voluntary curtesie will not have a consideration to uphold an assumpsit. But if that curtesie were moved by a suit or request of the party that gives the assumpsit, it will bind, for the promise though it follows, yet is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference."

But this manner of stating the law led to some confusion as to the basis on which it really rested which, as we shall see,[17] was not cleared up till the nineteenth century. To explain how this confusion arose, we must glance at the manner in which the form of assumpsit known as Indebitatus Assumpsit had been allowed to encroach on the sphere of Debt. *Slade's Case*[18] sanctioned the principle that the existence of a precedent debt raised an implied promise to pay it. The consideration for the promise was the precedent debt. But this was clearly a past consideration. This point was, as we have seen, taken in the case of *Hodge* v. *Vavisour* in 1617, but it was overruled.[19] The debt it was said "always continues," and "the law will imply a tacit consideration"; and it was compared to a case where the service was executed on the request of the defendant. Clearly these reasons were specious rather than sound. They were verbal quibbles put forward to explain the undoubted fact that Indebitatus Assumpsit lay upon a precedent debt and to square this fact with the undoubted rule that a past consideration was no consideration. The result seems to have been that not only the case where a promise was made to pay a precedent debt, but also the case where an act was done on request, were regarded as being in substance exceptions to the rule that a past consideration was invalid. For this reason the latter class of cases were not

[16] Hobart 105.
[17] See infra.
[18] (1603) 4 Co. Rep. 92b.
[19] Bulstr. 222; above, 94.

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treated, as the earlier cases treated them, as cases of executed consideration, but as showing that a past consideration, if given at the request of the plaintiff, was valid.[20] It was for this reason that it was held in the case of *Hayes* v. *Warren*[21] in 1724 that if work was done by the plaintiff he could not sue on a subsequent promise to pay unless it was alleged that the work was done at the request of the defendant, or unless such request could be implied by proof that the defendant had had the benefit of the work.

It is obvious therefore that the course which the decisions had taken in the seventeenth century had tended, firstly to obscure the relations between executed and past consideration, and secondly to indicate that the rule that a past consideration was invalid was a rule that admitted of exceptions. The rule that a precedent debt would support an action for Indebitatus Assumpsit was a clear exception; and, if it is argued that the consideration is sufficient because the man who owed the debt ought to pay it, it is clear that the acceptance of this argument will mean the admission of something very like moral obligation as a valid consideration.[22] It is clear, too, that the causes which make

[20] This is illustrated by the case of *Townsend* v. *Hunt* (1636), Cro. Car. 408; in that case the defendant's wife was an executrix and as such liable to pay a legacy of £60 to the plaintiff when he came of age; the defendant and his wife paid £53 in April and the plaintiff gave a general release; in September the defendant, in consideration that the plaintiff had at his request given this release, promised to pay the remaining £7; Jones and Croke J.J. held that the contract was valid, "for if this promise had been made at the time of the release made, it had been clearly a good promise and a good consideration; then, being made after the release, forasmuch as the release is made at the defendant's request, and the defendant hath the continuance of the benefit thereof, the promise upon this consideration is good enough"; after the verdict the exception that the consideration was past was again moved, "*sed non allocatur*: because it was made at the defendant's request"; note the recurrence of the idea that consideration may consist in a benefit to the promisor-defendant.

[21] Stra. 933—"it was objected that this was a past consideration; and not being laid to be done at the request of the defendant, it could be no consideration to raise an assumpsit."

[22] Thus in *Bosden* v. *Thinn* (1603) Cro. Jac. at p. 19 the court decided in favour of the plaintiff, "because Roberts, upon the plaintiff's undertaking at the defendant's request, had credit given him by Fludd; and that the plaintiff was damnified by reason thereof, which *in conscience the defendant ought to satisfy;* that the consideration is sufficient and not past"; cp. the Doctor and Student cited above, n. 6.

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for exceptions to the rule that consideration must move from the promisee, and especially the cases which allowed a person not a party to a contract to sue on a contract made for his benefit,[24] tend in the same direction. All this, as we shall see later, tended to obscure the logical development of the doctrine from its procedural basis in assumpsit. But at this point we must consider in the two following sections the development of certain other rules which emerged in the seventeenth century. Here again we shall see conflicting tendencies at work which prevented any final settlement of the law during this period.

(4) CONSIDERATION NEED NOT BE ADEQUATE, BUT IT MUST BE CERTAIN.

The law has never attempted to adjudicate upon the adequacy of a consideration. That is a matter for the parties to the contract. If a person chooses to make an extravagant promise for an inadequate consideration it is his own affair.[25] Thus in 1587 in the case of *Sturlyn* v. *Albany*[26] it was said that "when a thing is to be done by the plaintiff, be it ever so small, this is a sufficient consideration to ground an action"; and this principle is an accepted doctrine of our modern law. But though the consideration need not be adequate it must be sufficiently definite for the court to see that it really exists. Thus it was said in 1553 that "if I bargain with you that I will give you for your land as much as it is reasonably worth, this is void for default of certainty; but if the judging of this be referred to a third person, and he adjudge it, then it is good."[27] In 1588[28] and 1600[29] it was held that love and natural affec-

[24] Above 96-97.

[25] "The idea", says Sir F. Pollock, is characteristic not only in English positive law but in the English school of theoretical jurisprudence and politics. Hobbes says: "the value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give", *Contracts* (5th Ed.), 171.

[26] Cro. Eliza. 67; cp. *Bunniworth* v. *Gibbs* (1654), Style 419 *per* Rolle C. J.

[27] *Mervyn* v. *Lyds*, Dyer at f 91a.

[28] *Harford and Gardiner's Case*, 2 Leo. 30.

[29] *Brett* v. *J. S. and his wife*, Cro. Eliza. 756 "Natural affection of

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tion were not considerations upon which an assumpsit could be grounded. In 1636 it was held that a promise to forbear "aliquo tempore" was void for uncertainty.[29]

It is easy to state this principle, but difficult to apply it to concrete cases which come near the line; and it is clear that this difficulty will be enormously increased if once the law begins to develop those lines of cases which tended to mix up moral obligation and consideration. No doubt it is easy to say that one test of certainty is to be obtained by asking whether the act or forbearance has a definite value. But this solution merely shifts the difficulty, for, as we shall now see, the law had no very clear ideas as to what acts or things it accounted of sufficiently definite value.

(5) CONSIDERATION MUST BE AN ACT OF FORBEARANCE OF SOME VALUE IN THE EYE OF THE LAW.

The question whether or not an act or forbearance is of sufficient value in the eye of the law was discussed during this period chiefly in three classes of cases:—(i) when the promise was made in consideration of a forbearance to prosecute a groundless claim; (ii) when a promise was made by a creditor to his debtor that, in consideration that the debtor would pay or promise to pay his debt wholly or in part, the creditor would release him; and (iii) when a promise was made by a third person that he would do something for one of the parties to a subsisting valid contract, if that party would perform a promise to perform his duty under the contract.[30]

(i) Promises made in consideration of a forbearance to prosecute a groundless claim.[31] It was settled in 1568 in the case of *Stone* v. *Wythipol*[32] that forbear-

itself is not a sufficient consideration to ground an *assumpsit*: for although it be sufficient to raise a use, yet it is not sufficient to ground an action without an express *quid pro quo*."

[29] *Tolson* v. *Clark*, Cro. Car. 438.

[30] On these topics generally see Ames, *Two Theories of Consideration*, Lectures on Legal History, 323-353.

[31] See Ames, *op. cit.* 325-7.

[32] Cro. Eliza. 126.

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ance to prosecute an invalid claim was no consideration. In that case the executor of an infant testator promised to pay his testator's debt if the creditor would forbear to sue. It was held that as the creditor could not have sued for this debt because the testator was an infant, the promise of the executor to pay was based on no consideration. Coke's argument, to which the court assented, was as follows: "Every consideration that doth charge the defendant in an assumpsit must be to the benefit of the defendant or charge of the plaintiff, and no case can be put out of this rule. And this contract by the infant was void; and staying of suit is no benefit to the defendant, nor any charge to the plaintiff more than was before." This decision was followed in a long line of cases;[32] and substantially the same reasoning as that used by Coke was used by Tindal, C.J., in 1846.[33] But before this date it had ceased to be possible to state the principle quite so absolutely. It had been decided in 1821 that forbearance to prosecute a suit already instituted, when the law was doubtful, was a valid consideration for a promise.[34] This view was approved in 1861, and extended to a forbearance to institute proceedings to establish a claim which there was a bona-fide intention to make the subjection of litigation.[35] Finally in 1870, in the case of *Callisher* v. *Bischoffsheim*,[36] it was held that forbearance to prosecute a bona-fide claim was a good consideration, though the claim was in fact baseless. It would seem therefore that the old principle only applies to a forbearance to prosecute claims which the claimant knows to be baseless.[37]

[32] See the list collected by Ames, *op. cit.*, 325 n. 2.

[33] "In order to constitute a binding promise, the plaintiff must show a good consideration, something beneficial to the defendant, or detrimental to the plaintiff. Detrimental to the plaintiff it cannot be if he has no cause of action; and beneficial to the defendant it cannot be; for, in contemplation of law, the defence upon such an admitted state of facts must be successful, and the defendant will recover costs, which must be assumed to be a full compensation for all the legal damages he may sustain", *Wade* v. *Simeon*, 2 C. B. at p. 564.

[34] *Longridge* v. *Dorville*, 5 B. and Ald. 117.

[35] *Cook* v. *Wright*, 1 B. and S. 559. [36] L. R. 4 Q. B. 449.

[37] "Every day a compromise is affected on the ground that the party making it has a chance of succeeding in it, and if he bona fide believes

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(ii) During this period a much discussed question was the validity of a promise made by a creditor to his debtor that, in consideratoin of the debtor paying or promising to pay the whole or part of his debt, the creditor would release him. During this period opinion was fairly evenly divided upon this question. Let us look at the cases, firstly upon the question whether the actual payment, and secondly upon the question whether a promise to pay the whole or a part of an existing debt, could be a good consideration for release.

(*a*) There were two lines of reasoning which led the courts to deny that a part payment by a debtor was a consideration for a promise by his creditor to release him.

Firstly, after some hesitation in the fifteenth century,[39] the opinion of Brian, C.J., to the effect that a smaller sum cannot be a satisfaction for a larger,[40] had come to be generally approved in the sixteenth century.[41] The rule on this point was stated in its final form in *Pinnel's Case* in 1602:[42] "Payment of a lesser sum on the day in satisfaction of a greater cannot be

he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. . . . . It would be another matter if a person made a claim which he knew to be unfounded, and, by a compromise derived an advantage under it; in that case his conduct would be fraudulent," *per* Cockburn, C.J.L.R. 4 Q. B. at p. 452: "It seems to me that if an intending litigant bona fide forbear a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value," *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 C D. at p. 29, *per* Bowen, L.J.

[39] Y. B. 33 Hy. VI. Mich. pl. 32 (p. 48) *per* Danvers, J. cites Ames, op, cit. 329; and in Y. B. 10 Hy. VII Mich. pl. 4 Fineux J. expressed the same opinion—"Semble que il n'y ad diversite perenter le cas de satisfaction de concord in argent ou d'un cheval. Car nien obstant que le sum in concord soit mons que le sum in demande; uncore quand le debtee (i.e. creditor) ce ad recu per son agreement demesne, c'est ausey bon satisfaction a luy en Ley come receit d'un chose d'autre nature:" to the same effect Perkins, Profitable Book §749 (Ed. 1642), who notices the divergence of opinion on the point.

[40] "L'accion est port sur xxl., et le concord qui il paiera forsque xl., lequel appert estre nul satisfaction de xxl., car paiement de xl., ne poit estre paiement de xxl. . . Mes si fuit du cheval, quel cheval est paye accordant al concord, c'est bon satisfaction; car non appert le quel le cheval vault plus ou moins que le som en demande", Y. B. 10 Hy. VII Mich. pl. 4.

[41] (1563) Dalison 49; (1587) 4 Leo. 81.

[42] 5 Co. Rep. 117a.

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any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum; but the gift of a horse hawk or robe, etc., in satisfaction is good." This really amounts to the arithmetical proposition that a lesser sum cannot be satisfaction for a greater.[43] It is a rule relating to the discharge of contract which naturally followed from the limitations of the action of debt. It is not and it could not be based upon the view that such an agreement was not enforceable by action of assumpsit because there was no consideration for it, for the simple reason that the action of assumpsit was only just beginning to develop, and the doctrine of consideration was as yet wholly undeveloped.[44] In fact, till the expansion of assumpsit to remedy purely executory contracts it was inevitable that this question should be regarded solely from this point of view. A mere agreement to discharge was not actionable. It only became actionable when the thing for which the discharge was promised was done; for, till then, the promiser had no quid pro quo. But if that thing was less than the party doing it was liable to do, where was the quid pro quo? As Brian, C.J., said, "It is agreed that the agreement merely is nothing to the purpose, but the agreement coupled with the satisfaction; so that the performance of the agreement is the substance of the plea."[45]

Secondly, the Roman rule that a contractual obligation ought to be discharged by the same formalities as those by which it had been made, had been received by the common law.[46] It followed that a contract which purported to discharge an existing contractual obligation must be based on consideration. But if A, being under a contractual obligation to pay £10 to B, agrees with B that if B will discharge him, he will pay £5, what consideration is there for B's promise? Clearly

[43] Ames, *op. cit.* 330-1.
[44] Ames, *op. cit.* 330.
[45] Y. B. 10 Hy. VII Mich. pl. 4.
[46] Holdsworth, *Hist. Eng. Law*, ii, 222 n. 10.

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A has incurred no detriment by the making of such a promise. It follows that such a consideration is not valid. This reasoning was followed in *Richard's and Bartlet's Case* in 1584.[47] In that case R, the executrix of A, sued B for the price of corn delivered by her testator. B pleaded that, after the contract had been made, R agreed that, because the corn had been lost by a tempest, he would charge only part of the price, and that he had always been ready to pay this part of the price. The whole court decided in favour of the plaintiff, "because there is here not any consideration set forth in the Bar, by reason whereof the plaintiff should discharge the defendant of this matter, for no profit but damage comes to the plaintiff by this agreement, and the defendant is not put to any labour or charge by it, therefore here is not any agreement to bind the plaintiff." This decision was followed by cases decided in 1591[48] and 1597.[49] In the latter of these cases it was held that the payment of the same sum as that to which the plaintiff was liable to pay was no consideration for a further promise by the defendant.

It follows, therefore, that whether we regard the rule as a rule relating to the acts which will operate as a discharge. or whether we regard it as a rule regulating the validity of a contract to discharge the party liable, the same result is produced. The payment of the whole or a part will operate neither as a discharge, nor will it be a consideration for an agreement to discharge.

So far the law is clear. The payment of the whole or part of the sum due cannot be consideration for a further promise because such payment is no detriment to the promisee. But in the sixteenth and seventeenth centuries the law was not finally settled on these lines. There is another line of cases in which the judges, looking rather at the benefit derived by the promisor in getting speedy payment or payment without action,

[47] Leo. 19; cp. Street, op. cit. ii, 98-9.
[48] *Greenleaf* v. *Barker*, Cro. Eliza. 193.
[49] *Dixon* v. *Adams*, Cro. Eliza. 538.

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held such payment to be a valid consideration for a promise to release the debt. They held therefore that though as decided in *Pinnel's Case*,[50] payment of a lesser sum was no satisfaction of a greater, yet the payment of such lesser sum might be a valid consideration for a promise to give a release or to do some other act. Thus in *Reynolds* v. *Pinhowe* (1595)[51] the defendant had recovered £5 from the plaintiff. In consideration of £4 paid to him by the plaintiff the defendant promised to acknowledge satisfaction of the judgment. The Court held the contract valid "for it's a benefit unto him to have it without suit or charge." The same view was put forward by Coke, C.J., in *Bagge* v. *Slade* (1617).[52] "If," he said, "a man be bound to another by a bill of £1,000 and he pays unto him £500 in discharge of this bill, the which he accepts of accordingly, and doth upon this assume and promise to deliver up unto him his said bill of £1,000, this £500 is no satisfaction of the £1,000, but yet this is good and sufficient to make a good promise, and upon a good consideration, because he hath paid money—£500—and he hath no remedy for this again." Possibly Coke may have considered that the payment was a consideration because, if such payment could have been resisted, it was a detriment to the promisee; but I think that his dominant idea was that the payee has got the money, and that this benefit to him should be a consideration—as he said elsewhere in the same case, "I have never seen it otherwise, but when one draws money from another, that this should be good consideration to raise a promise." There are other cases decided in the seventeenth century in which the same reasoning was used;[53] and we shall see that it was not till the beginning of the nineteenth century that it was finally

[50] 5 Co. Rep. 117a.

[51] Crow Eliza. 429.

[52] 3 Bulstr. 162.

[53] *Flight* v. *Crasden* (1625), Cro. Car. 8 (payment of the whole); *Johnson* v. *Astell* (1667), 1 Lev. 198 (payment of less); Anon (1675) 1 Ventris 258 (payment of the whole); and see other cases cited by Ames, *op. cit.*, 331-2.

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settled that the payment by a debtor to his creditor of a part of a sum due cannot be a consideration for a promise by the creditor.[54]

(*b*) As soon as it was recognized that a promise given for a promise was a valid consideration[55] it is difficult to resist the conclusion that a promise by a debtor to pay part of a debt to his creditor ought to be a consideration for a promise by the creditor to release him. This view seems to have been taken in the earlier half of the seventeenth century. In the case of *Goring* v. *Goring* (1602)[56] an agreement by an executor to discharge a creditor of his testator who owed £205 in consideration of the payment by him of £150 in instalments, though admitted to be no valid satisfaction, was held to be a valid agreement, as it was promise against promise.[57] Similarly Comyn states that "an accord with mutual promise to perform is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance."[58] It was not till the following century and not without some conflict of opinion, that it came to be thought that promises of this kind, though mutual, were inoperative to operate as a satisfaction of the original debt. The view that in this case the mutual promises are not considerations for each other derives its strength from cases in which the judges had failed to adapt the old rules as to accord and satisfaction to the new situation created by the rise of the wholly executory contract. We should however note that there is authority to the contrary, and that the law on this point is not yet

[54] See infra.

[55] Above 93.

[56] Yelv. 11.

[57] "And (*per Curiam*) the consideration alleged is sufficient for another reason; for although the plaintiff has now shown that he has discharged the defendant of the £205, yet if the defendant should afterwards be charged with it, he might have *assumpsit* against the plaintiff; for the plaintiff agreeing to take £150 for £205 is a promise on his part, and so one promise against another, *ibid.*: cp. Ames, *op. cit.*, 348.

[58] Digest, *Accord* B 4.

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wholly settled. But this is a topic which belongs more properly to the discharge of contract.

(iii) A somewhat analogous problem to that last discussed arises when a promise is made by a third person that he will do something for one of the parties to a subsisting valid contract if that party will perform or promise to perform his duty under the contract.[80] Such contracts are of course of comparatively rare occurrence; but during this period at least two cases arose in which the problem was discussed. Both were cases in which the consideration for the promise by the third person was, not the actual performance by the party to the contract of his duty under that contract, but a counter promise by that party to perform his duty.[80] In the case of *Sherwood* v. *Woodward* (1600)[81] the plaintiff sold cheeses to the defendant's son. The defendant "in consideration the plaintiff would deliver the said cheeses to his said son, assumed that if the son did not pay for them then he would." The son did not pay, and the plaintiff sued on this promise. In arrest of judgment it was moved "that this was not any consideration; for it is no more than what the law appoints to deliver that which he sold." The Court overruled this objection and held the consideration valid. In the case of *Bagge* v. *Slade*,[82] "Two men were bound in a bond for the debt of a third man; the obligation being forfeited, so that they both of them were liable to pay this; the plaintiff here in this writ of error said to the other, pay you all the debt, and I will pay you the moyety of this again, the which he paid accordingly, and so made his request to have a repayment made to him of the moyety according to his promise, which to do he

[80] On this topic there has been much discussion: see Ames, op. cit. 327-9, 340-8; Williston H. L. R. VIII 27-38; Langdell, H. L. R. XIV 496-508; Pollock, L. Q. R. VXII 419-422; Street, *op. cit.*, ii. 116-120.

[80] But Ames, *op. cit.*, 327 takes the view that in *Bagge* v. *Slade* 3 Bulstr. 162, the consideration was the performance; for the reasons given below I do not agree.

[81] Cro. Eliza. 700.

[82] (1616) 3 Bulstr. 162.

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refused." Thereupon the plaintiff sued for the moiety, and judgment was given for him.

Now it is reasonably clear that both these cases were cases of promise for promise. It is clear in the first case that when promise was made the cheese was not yet delivered; and in the second case that when the promise was made the money had not yet been paid. For this reason no valid objections can be taken to the actual decisions in these cases. A promise for a promise was clearly a valid consideration—why should not a promise to perform a legally enforceable duty already owed to a third person be a good consideration for a counter promise? We shall see that, unlike the case of a promise by a debtor to pay a sum less than the debt owed in consideration of a counter promise to give a release, no body of opinion excluding this particular sort of promise has grown up.[63]

But in both of these cases the court went a good deal further than this. In both they were inclined to take the same view as was taken in that line of cases in which it was held that a payment of part of a debt might be good consideration for a promise to release the whole;[64] and in both they assigned as the reason for their view that such payment was a valid consideration the fact that it was a benefit to the creditor to get the money. We have seen that his view is indicated in Coke's remarks in the case of *Bagge* v. *Slade*,[65] and it is even more clearly apparent in the remarks of Gawdy and Fenner, J.J., in the case of *Sherwood* v. *Woodward*. "It is an ease," they said,[66] "to the bargainee to have them without suit, which peradventure otherwise he could not have had. And although the bargainee may take them in this case, the bargainor is not bound to deliver them; and there is a new act done by him upon this agreement, and it is an ease to the vendee."

[63] See infra.
[64] Above 182.
[65] Above 182, 183.
[66] Cro. Eliza. 700.

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The development of these rules during the sixteenth and seventeenth centuries shows that consideration was acquiring a technical meaning in connection with the law of contract, and that a doctrine of consideration was growing up. As Assumpsit was fast ousting all other remedies for the enforcement of contracts it was only natural that the contents of that doctrine should be shaped largely and perhaps principally by the exigencies of that remedy. It tended to be a reflection of the conditions which a plaintiff must satisfy before he could succeed in this action. But, as the developments just described show, this was not the only influence which has gone to the making of the doctrine. Ideas derived from the quid pro quo which must be proved in order to succeed in an action of debt; ideas derived from the very different conception of consideration which was being developed by the Court of Chancery; and doubts as to the invalidity of a past consideration, caused largely by the fact that the past consideration of a precedent debt was the foundation of the action in Indebitatus Assumpsit—all tended to import into the doctrine of consideration elements which led in practice to results very different from those which flowed from the view that it was simply the sum and substance of the conditions which a plaintiff must satisfy in order to succeed in an action of Assumpsit. We must not underrate the importance of these elements. We shall now see that during the eighteenth and early nineteenth centuries they came very near to ousting the ideas derived from the conditions under which Assumpsit lay; and that it was not till the second half of the nineteenth century that the latter set of ideas prevailed, and that the doctrine was settled on its modern basis.

* * * * * * * *

The modern doctrine of consideration was settled on lines which are remarkable for the historical and logical correctness with which they have been deduced

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from that procedural basis in the action of assumpsit from which the conception of consideration originated. Whether the resulting law is wholly fit for the needs of this twentieth century is another question which I shall discuss in the following section.

"CAUSE" AND CONSIDERATION.[67]

The canon law, starting from the basis that faith should be kept, had evolved a theory of contract based upon a generalized conception of the Roman causa; and this canonist conception of causa had been accepted and applied by the chancellors in the exercise of the jurisdiction which, during the Middle Ages, they were assuming over contract. This fact comes out clearly enough in the Latin version of the Doctor and Student;[68] and that the Doctor and Student correctly represented the facts may be said to have been proved by Professor Barbour's essay on the history of contract in early English equity. At this point it is only necessary to recall briefly the main characteristics of this conception of causa. They may be summed up, says Professor Vinogradoff, under the following heads:[69] "(1) The promise must be intentional; (2) it is subject to be taken back in consequence of a material change of circumstances; (3) it must have a reasonable cause, which may consist either in a material equivalent or in moral considerations; (4) a liberal disposition is to be deemed a sufficient cause in the case of gifts; (5) promises to moral persons, to political, learned or religious bodies, are legally valid if they are made for the sake of their moral aims, *e.g.*, for the honour of God, the advancement of learning, assistance of the poor, and the like."

It is obvious that this canonist theory of causa made for an extension of the sphere of the enforceable agreement, and a corresponding restriction of the sphere of

[67] On this subject generally see E. G. Lorenzen, Causa and Consideration in the Law of Contracts, Yale Law Rev., XXVIII, 621.

[68] L. Q. R., XXIV, 381-4.

[69] L. Q. R., XXIV, 382.

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the nude pact; for if, as seems probable, causa in the civil law means actionability," the extended meaning given to the term by the canonists necessarily had this effect. In the sixteenth and seventeenth centuries the tendency toward this extension was assisted by two other causes. It was assisted firstly by the notion that "the enforceable quality of all agreements was demanded by natural law, and that the non-enforceability of pacts was a specific Roman doctrine which was opposed to natural law"; and, secondly, by the mistaken idea that the old Germanic law specially emphasized the duty of keeping faith." The two latter causes, and especially the second, led in Germany to the total elimination of causa as a necessary condition precedent for the enforceability of contracts." In other countries, however, a causa still continued to be necessary; but it was a causa of the canonist type. It would seem, in fact, that this canonist theory of causa inspired the theory of contract accepted in many continental states in the seventeenth and eighteenth centuries." Thus the necessity for a causa is stated to be ncessary by many writers on Roman Dutch law." It was introduced into the French law by Domat, accepted by Pothier, and, through Pothier, found a place in the code Napoleon." Brissaud points out that the theory was accepted the more easily because it could be regarded as a development of the older ideas which required something which corresponded to the English quid pro quo."

[10] "With the Romans an agreement was not actionable unless there was some reason why it should be so. The result is that, in these texts, *causa* means actionability, and does not denote anything else, independent of actionability, which creates that important characteristic." Buckland, Roman Private Law, 232.

[11] Yale Law Rev., XXVIII, 631.

[12] "In Germany the notion erroneously attributed to the older Germanic law that 'every lawful agreement entered into with the serious intention of being legally binding would directly produce of its own force obligatory effect, without regard to the form in which it was expressed,' ultimately prevailed: which left no room for the requirement of a *cause* as a necessary element for the enforceability of contracts," *ibid.* 632.

[13] *Ibid.* 630-31.

[14] *Ibid.* 631.

[15] *Ibid.* 632.

[16] La *cause* pour les anciens jurisconsultes correspond au *quid pro quo* ou a la consideration du droit anglais: ils on pris pour point de depart

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But the "cause" which was thus adopted into French law and Roman Dutch law was, as might be expected from the conditions under which it originated, both elastic and vague. Thus "the existence of a natural, *i.e.*, moral, obligation, or even of a real or supposed duty in point of honour only may be quite enough. Nay, the deliberate intention of conferring a gratuitous benefit, where such intention exists, is a sufficient foundation for a binding unilateral promise." It is not surprising therefore that considerable difficulty should have been experienced in making a satisfactory definition of the term.[76] Nor is much light got from the interpretation placed upon the clause of the code civil which enacts that "L'obligation sans cause, ou sur un fausse cause, ou sur une cause illicite, ne peut avoir aucun effet."[77] A contract is said to be without a cause if the parties did not intend by their agreement to affect their legal relations, or if the subject matter of the contract had perished before the contract was made. It is said to have a false cause if the parties contracted under a mistake as to the existence of certain facts belief in which induced the making of

les ideés romaines sur la *condictio sine causa*, sur les contrats innomés, sur les nullités des stipulations, et de la ont tiré la règle; pas d'obligation sans cause. *Cil n'a mie bele reson de demander*, dit P. de Fontaines, *qui demande por ce que on li covenanca, sanz autre reson metre avant.* On accepta plus facilment ce principe qu'il cadrait dans beaucoup de cas avec la théorie plus ancienne de la nécessité de l'execution au moins partielle du contract pour qu'il resultat une obligation," Brissaud, Droit Francais ii, 1419-20.

[75] Pollock, Contracts (5th Ed.,), App. 692; cp. *Jazawickreme* v. *Amarasuriya* (1918), A. C. at p. 875, where the Judicial Committee says "It may well be that according to English law, as a general rule, an existing moral obligation not enforceable at law does not furnish good consideration for a subsequent express promise; but the Roman Dutch law, by which, in their Lordships' view, this case must be governed, is wholly different. According to the latter law, it would appear that a promise deliberately made to discharge a moral duty, or to do an act of generosity or benevolence can be enforced at law, the justa causa debendi, sufficient according to the latter system of law, to sustain a promise, being something far wider than that which the English law treats as good consideration for a promise."

[76] Many attempts have been made to find a general definition of *causa*, but none of them has met with approval. . . .Great difficulty seems to be experienced by the French writers in distinguishing the *causa* of a contract on the one hand from its object, and on the other hand from motive in general," Yale Law Rev., XXVIII, 632.

[77] Art. 1133.

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the contract—*e.g.*, a proimse by A to B to pay B a sum of money under the false belief that he owed him the money. It is said to have an illegal cause if the object of the contract is illegal.[80] All this really amounts to is that the parties must have really consented, and that the object of their contract must be legal.[81] Hence it is not surprising to find that many French writers reject the idea that causa is needed for the validity of a contract. "They regard the requirement of causa as an abstract and metaphysical notion calling for subtle distinctions, and creating confusion instead of serving a useful purpose."[82] The same view seems to be taken by distinguished Roman Dutch lawyers. Thus, Professor Lee calls the requirement of causa "a juristic figment,"[83] and says that it means little more than that "an agreement to be legally enforceable must be entered upon with a serious and deliberate mind." Exactly the same reasoning applies to causa as defined by the Spanish civil code, the Chilean code, and the countries in America which have adopted the provisions of those codes.[83a]

Thus the process of the alteration of the Roman causa has proceeded continuously and logically to its inevitable result—the elimination of the necessity for a causa as a condition of the validity of a contract. And, as in Germany the same result has been produced by the belief that the old Germanic law enforced as a contract every lawful agreement intended to be legally binding,[84] it follows that, in most countries outside the sphere of the common law, the maxim, *ex nudo pacto non oritu actio* has ceased to be true. "Any pact whatever," says Profesor Lee, speaking of Roman Dutch law, "is enforceable provided only that it is freely entered upon by competent persons for an object which is physically possible and legally permis-

[80] Yale Law Rev., XXVIII, 633.
[81] See Lee, Introduction to Roman Dutch Law, 198.
[82] Yale Law Rev., XXVIII, 634, and note 75.
[83] Introduction to Roman Dutch Law, 198, n. 2.
[83a] Yale Law Rev., XXVIII, 635.
[84] Above 203.

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sible'';[35] and the same description, it would seem, might be given of either the actual state of the law or the state to which it is approximating in all civilized countries which are not governed by the common law. The result is a striking illustration of the truth of Lord Denman's dictum that the doctrine that moral obligation is a sufficient consideration "would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it."[36]

The adoption by the law of this liberal attitude ensures the carrying out of the lawful intentions of contracting parties; and, if it is right that the law should enforce contracts, there seems no good reason why it should not at the present day adopt this attitude. There seems to be no reason why it should allow itself to be fettered either by obsolete procedural difficulties, or by obsolete technicalities which have been inherited from other legal systems. But undoubtedly such a system of contract law has its weak points. In the first place there is the difficulty of proving the contract; and in the second place there is the difficulty of proving whether or not the parties really intended by their agreement to affect their legal relations. Both these questions may raise very difficult questions of fact. But these difficulties may be obviated by requiring, as French law requires, all contracts which involve more than a certain sum of money to be in writing,[37] and by requiring, as is done in many countries, that promises to give shall be authenticated by a judge or notary.[38]

Continental systems of law, therefore, by gradually alternating, and then in effect dropping, the doctrine of causa, have worked out a theory of contract very different from the English system based on the doc-

[35] Op. cit., 197.

[36] *Eastwood* v. *Kenyon* (1840), 11 Ad. and E. at p. 450.

[37] Yale Law Rev., XXVIII, 642, citing Art. 1341 of the Civil Code; for a similar rule in Scotland, see Bell, Principles, Secs. 63, 67, cited (1918) A. C. at p. 875, n. 2.

[38] Yale Law Rev., XXVIII, 643, citing the codes of France, Germany and Italy.

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trine of consideration. But it will be clear that, if the eighteenth century theories of moral obligation and still more if the theory put forward by Lord Mansfield in *Pillans* v. *Van Mierop* had prevailed, the English theory of contract would now be approaching very closely to the continental system. It is worthy of note that in the case of *Pillans* v. *Van Mierop*, Wilmot, J., to a large extent based his judgment on an identification of the civilian cause with the English consideration.[80] As the civilians held that there could be no nudum pactum when the agreement was put into writing, because the writing made a causa, so in England writing should supply the place of consideration. But we have seen that this theory was never accepted; and that, in the second quarter of the nineteenth century, the theory that moral obligation was a valid consideration was rejected. Both these lines of development, therefore, were closed.

Instead, a return was made to those sixteenth and seventeenth century cases in which the doctrine of consideration was being developed from the procedural necessities of the action of assumpsit. Thus the English theory of contract is still bound up with the conditions imposed upon it by the form of action through which contracts, other than specialty contracts, became enforceable.

No doubt the resulting theory of contract has its strong points. "Roughly stated, it seems plain and sensible, the court will hold people to their bargains, but will not enforce gratuitous promises unless they are made in solemn form."[81] It is in fact strong when the rival theory is weak. But it may be questioned whether in its present form its weaknesses do not outweigh its advantages. Some of its weaknesses have been very clearly pointed out by Markby.[82] A gratuitous promise is not actionable unless it is made in writing under seal; but the court will not inquire into

[80] (1765) 3 Burr. at pp. 1670, 1671.
[81] Pollock, Genius of the Common Law, 91.
[82] Elements of Law (3rd Ed.,), 310-317.

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the adequacy of the consideration; a mere nominal consideration will suffice. Why should not the performance by A of his duty under his contract with B be a consideration for a promise by C to A? Why should not a promise to keep an offer open for a week, or a promise to release a debt in consideration of part payment, be valid? Why, in fact, should not any promise be binding if the party promising intended to put himself under a legal liability? The requirement of consideration in its present shape prevents the enforcement of many contracts which ought to be enforced if the law really wishes to give effect to the lawful intentions of the parties to them; and it would prevent the enforcement of many others if the judges had not used their ingenuity to invent considerations. But the invention of considerations by reasoning, which is both devious and technical, adds to the difficulties of the doctrine."[92] Markby's strictures have recently gained an increasing measure of support. Sir F. Pollock has said that the application of the doctrine "to various unusual but not unknown cases has been made subtle and obscure by excessive dialectic refinement.'"[93] In a recent case Lord Dunedin said,[94] "I confess that this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration. For the effect of that doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to

[92] "In some cases, where it was clear that contractual liability ought to be recognized, they have found great difficulty in recognizing it, because they could not find any 'consideration,' although there was ample other indication of intention. They have in most cases managed to get over the difficulty, but by reasoning which is the reverse of satisfactory," Markby op. cit. 311.

[93] Genius of the Common Law, 91.

[94] *Dunlop Pneumatic Tire Co.* v. *Selfridge & Co.* (1915), A. C. at p. 855; it might, however, be contended that the refusal to uphold the validity of the contract in this case was on the whole in accordance with public policy, as a contrary decision would have facilitated the operations of a design to keep up prices as against the public; this does not, however, affect the main argument.

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enforce it has a legitimate interest to enforce." Professor Lorenzen, in an able article in the Yale Law Review, to which I am much indebted, takes substantially the same view.[96]

In fact, the doctrine of consideration in its present form is something of an anachronism. The substantive law has long ago broken away from the leading strings of the forms of action, and the law of actions has become merely adjective law. But our theory of contract is still governed by a doctrine which is historically developed with great logical precision from the procedural requirements of the form of action by which simple contracts were enforced. These procedural requirements were not mere matters of form. They were the conditions precedent for applying the remedy which was the best, and in many cases the only remedy which the common law possessed for the enforcement of contracts. Thus it happens that it has not been possible to treat the doctrine of consideration as mere form. It has been necessary to treat it as the essential condition for the validity of all simple contracts.

There is, it seems to me, much force in Markby's contention that consideration should be treated not as the only test of the validity of a simple contract, but as an indication—"an indication, but an indication only, amongst many others, that the parties entering into a transaction had in contemplation their legal relations to each other."[97] This is in effect the view which Lord Mansfield tried to enforce in *Pillans* v. *Van Mierop;*[98] and though, like other rulings of Lord Mansfield, it was demonstrably not English law, it embodied an idea of what the law ought to be which has come into its own in the succeeding centuries.

An essay on a point of legal history is not perhaps

[96] "Subject to certain qualifications relating to form, it should suffice for the formation of contracts that there exist (1) capacity; (2) an intention to contract; and (3) a possible and lawful object." Yale Law Rev., XXVIII, 646.

[97] Elements of Law, 316.

[98] Above 190.

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the place to make sugestions as to the law of the future. It is concerned with the past. But if history is to be something more than mere antiquarianism, it should be able to originate suggestions as to the best way in which reforms in the law might be carried out so as to make it conform with present needs. The doctrine of consideration has, as we have seen, its strong points. Its weakness is that it is inadequate as the sole test of the validity of simple contracts. The true remedy, therefore, is not to scrap it, but to reduce it to a subordinate place in the English theory of contract. This, it seems to me, could be done, and at the same time a great simplification could be made in the English law of contract, if a short Act were passed which (1) abolished the differences between simple and specialty contracts;[*] (2) repealed Sec. 4 of the Statute of Frauds and Sec. 4 of the Sale of Goods Act;[**] and (3) provided that no contract should be valid unless *either* consideration was present, *or* it was put into writing and signed by all the parties thereto. By making these changes we should get a body of law which would be easy to apply, and would allow a greatly increased freedom of contract. The need for proof of the existence of the contract and of the intention of the parties to contract would be satisfied; and, at the same time, full effect could be given to the intention of the parties to create contractual relations.

[*] Something like this has already been affected in the law as to the administration of assets by 32, 33 Victoria, c. 46; Re Samson (1906), 2 Ch., 584.

[**] It might be necessary to reconsider other statutes which impose restrictions of form; the rule that the contracts of corporations must be under seal would not necessarily be affected, but they would cease to be specialty contracts.

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A " CRIME COMMISSION " FOR CANADA.

By A. E. Popple.

Recently some startling revelations have been made in connection with juveniles. The rising generation threatens to ruin its soul as well as its body by extending its criminal propensities into the realm of drugs. It is a serious state of affairs. Are we to let them go their way to dstruction or should we reach out a hand to help them? The magistrates and judges are alarmed at the number of juveniles they are compelled to send to the penitentiary. It seems to be agreed that punishment for crime is an abject failure so far as reform is concerned. Once a juvenile has been through a reformatory, the next place to look for him is in the penitentiary. Once he has been an inmate of a penitentiary, his destruction as a citizen is complete. No organization, however sympathetic, will ever save him.

Public opinion is urging that punishment be replaced by material reconstruction. Bodies are to be strengthened and minds cleansed. A sympathetic understanding of personal difficulties is to be extended to those in error. The present state of the law is inadequate to give effect to the trend of public opinion. The Statutes which deal with " punishment " and the systems under which our gaols and prisons are governed need bringing up to date. The slowness with which the authorities move along these lines is in strange contrast to the speed with which they enact prohibitory laws—filling the penitentiaries instead of emptying them.

Education has saved humanity so far, and it is along these lines that the youthful criminal will ultimately be saved from destroying himself. A grievous wrong is being done to the child to-day by parent and state. Both are punishing the crime instead of saving

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the criminal. It is a fundamental principle that every wrong has a remedy, and this wrong which is being done to the child calls for a better remedy than that of punishment. What that remedy is and how it can be best applied cannot be solved by the individual. These things should be solved by a body of experts.

It must be apparent to every one that there is urgent need for a " Crime Commission " to solve such difficulties as these. Such a commission could enquire into: (1) The causes and results of delinquency and crime; (2) The effectiveness of private and public institutions; (3) Co-operation and co-ordination of police and other authorities; (4) Prevention of crime; (5) Administration of the criminal law in Canada. In this way uniform penal legislation could be brought about, and the people would be provided with the means to enquire into police conditions in any city or province. Here is a field of opportunity for the Canadian Bar Association, and for the members of the Constables' Association of Canada, both of which organizations are earnestly striving to remedy crime conditions in Canada.

Edmonton, Canada.

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TUNNELLING UNDER THE TARIFF WALL.

By M. L. Hayward, B.C.L.

The Manager of the Burstall Branch of the Regal Bank of Canada was in a critical and cross-examining frame of mind.

"How much does Herbert H. Brown owe us now?" he demanded.

Harry Evans, the accountant, had the information at the tip of his tongue.

" $17,559 and interest since 1st instant."

"How long since he's made any payment on account?"

"Nearly ninety days."

"I guess my information was correct," admitted the Manager. "I understand that Brown's up against it pretty hard and is liable to be forced into bankruptcy any day."

"A loss of nearly eighteen thousand dollars'll make a bad showing in our report to Head Office," suggested Evans.

"Yes, and that isn't the whole of the story," grumbled the Manager. "The People's Co-operative Union's going to have pretty hard sledding if I'm any judge'a the market."

" 'Spose we can do anything to save our bacon as far's Brown's concerned?" queried Evans.

"Say, do you remember the time that young lumberman up Linden way, Blake his name was, had got into us for nearly as much and his lumber drive was all tangled up?" suggested the Manager. "That time you went up and worked some scheme so Blake got his drive brought in free—paid us off in full, and pocketed a nice stake for himself."

"Those things only happen once," interrupted Evans, "and it was Logan's idea, anyway."

"Well, history may repeat itself, and you'd better take this in hand and see what you can do," declared

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the Manager. "It is understood that you can call on Mr. Logan for legal assistance at any time you wish, and the bank pay all the bills."

"Well, I'll do my best and that's all a Ford can do," agreed Evans.

The next morning Evans sat at his desk, considered the Herbert H. Brown proposition from every angle, and every moment it looked more hopeless.

His gloomy train of thought was interrupted by the entrance of a tall young man who strode in without knocking and approached the young accountant with a sunny smile and a glad hand.

"Donald Hart, of all men," Evans exclaimed, "and how are you, and how goes everything? Do you realize that I've seen you just once since we left High School?"

"Yes, and you wouldn't have seen me to-day if I hadn't been in trouble," admitted Hart.

"Well, that's one advantage," declared Evans. "But tell us all about yourself. I heard of you when I was up to Linden, but could never manage to get my eye on you."

"It was your Linden reputation that brought me here," Hart explained. "Day before yesterday I had to take a trip over to Linden, and met Hill, the big lumber king."

"We were quite chums, considering the difference in our ages and financial standing," interrupted Evans.

"He was telling me that they call you the 'legal detective,' and about the time that you caught one of Hill's jobbers trying to put a crooked scale over on him."

"That was just purely luck," laughed Evans.

"And Arthur Blake told me how you worked his business rival and future father-in-law into spending $15,000 to drive Blake's logs for him," Hart persisted, "and I said to myself, 'Harry's the boy to pull me out of my own trouble if anyone can,' so I jumped on the next train and here I am."

"Tell me the whole story," urged Evans. "I don't

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suppose I can help you any, but they say that trouble shared with a friend seems lighter."

"Well, to begin at the beginning," Hart explained, "when we left High School you dropped into a soft seat in the Regal Bank, while I had to start out and hunt up a job myself. I was lucky enough to get with Brown & Benson, the biggest manufacturers of mineral and aerated water in Canada."

"Herbert H. Brown?" snapped Evans.

"Yes—what about it?"

"I'll tell you later," parried Evans. "You're telling your troubles—not listening to mine."

"I went up to Cardigan to take charge of the plant there, fully determined to make good and show them that I was worth a little more than they were paying me," Hart went on.

"And you did—I'll bet our last month's profits on that," interrupted Evans.

"I believe I did," Hart admitted, "and I also proceeded to fall in love with Maisie Brown, the charming and only daughter of the senior partner, and, as the story books say, 'my affection was reciprocated.' "

"You're in the same boat Arthur Blake was sailing in—dead in love, judging from my slight knowledge of the symptoms."

"How well I remember the first morning she came down to the old factory," Hart went on enthusiastically. "It was a beautiful September day; the magic of Indian summer filled the air, and the mellow sunlight, filtering through the leaves of the ancient elms that lined the yard, lit up her bronze hair with a halo of golden light. I remember, too, that afternoon when old Benson stepped into Brown's office with a dark scowl on his heavy face, and smashed a hairy fist on the desk.

" 'What does this mean about Maisie and this young gimp of a manager?' he demanded hotly.

"I had 'had it in' for him for weeks, and I made a race for him with unholy joy in my heart and a knockout in either clinched fist, but Brown waved me aside and turned to Benson.

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" 'I don't see that it's any of your d—— business,' he replied, 'but as you've asked I don't mind telling you that the engagement will be announced next week.'

" 'But I thought it was understood that my boy Percy wanted her,' snarled Benson.

"Brown was very calm.

" 'It was, but it's also understood that she don't want him. In fact it's bad enough having him hanging around the factory pretending to work, let alone taking him into the family,' was the quiet retort.

"For a moment I imagined that Benson was going to spring at his partner's throat, but he seemed to think better of it.

" 'Then here's where we dissolve partnership right now,' he growled.

" 'Talk enough. We'll have the papers drawn up this afternoon,' Brown agreed.

"So when Brown started in alone after the dissolution, it was the most natural thing in the world for him to offer to take me in as a junior partner, and I had every possible motive for accepting it and working like a trooper to make the business a success."

"I can imagine so," Evans agreed.

" 'But remember, Benson's a regular Indian and will stop at nothing to hamper us. I know him better than you do,' Brown warned me, but when a fellow's in love warnings about mere business matters don't worry him any.

"When the incident of the Harper spring arose, I began to think so; but when I located the U. S. A. spring, I breathed easy again.

"Then one day a month later Brown walked into the office with the morning paper and pointed to the report of the tariff debate at Ottawa.

" 'Read that,' he said sternly.

" 'Good heavens,' he gasped, as I shot my eye down the page.

"Winslow, our legal adviser, was promptly called in, and just as promptly pronounced our case hopeless.

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"'You're hog tied,' he announced decisively as he walked out.

"'We're trimmed,' declared Brown despondently enough, and for the first time in my life I sympathized with the mental attitude of the despised and rejected Cain," Hart hurried on.

Evans held up a detaining hand.

"Hold on," he urged, "you're leaving out half of your story. What about this Harper spring that you mentioned a moment ago?"

"I suppose I am rambling pretty badly," Hart admitted, "but I'm so stirred up over the matter that I imagine everybody ought to understand it as well as I do."

"Go back to the time that Brown and Benson dissolved partnership," Evans suggested.

"I think I explained to you, if not I will now, that Brown and Benson went down to Winslow's office and signed up a dissolution agreement specifying that Brown was to keep the old plant and pay Benson so much cash."

"And Benson took his money, built a new plant and now he's trying to sell his stuff on the reputation of the old firm," interrupted Harry.

"Hardly that," Hart went on, "for we were prepared for any competition that he could put up, but the old firm owned a mineral spring that they used a lot of water from in putting out the manufactured product, and that spring went to Brown under the dissolution agreement. There was another spring in the vicinity, however, and they had always used a certain amount of mineral water from that spring, and it was absolutely necessary in the business, as it supplied a missing element in our own spring."

"Didn't you have a deed of it, or some claim in writing?"

"No—that's the missing link as well as the missing mineral element, for it belonged to an old hermit by the name of Harper. He'd been stung once selling a mining claim out west and he wouldn't sign a paper for

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love nor money. So he'd never sell the land or give us a written agreement allowing us to use the water, but always let us take whatever we wanted at a very low rate. It was a term of the separation agreement that we were to have the water from the spring in future and divide it equally. There were no writings to that effect, though, and after we dissolved Benson in some way persuaded the old guy to sell the spring to him."

"And cut you out," interjected Harry.

"Exactly," replied Hart. "We're putting up the same goods under the old name, and without the missing ingredients which that water supplied the stuff would lose its reputation and our sales would dwindle away below the vanishing point."

"Couldn't you get the water elsewhere?" asked Evans.

"That's where Benson got in his real underhand work," declared Hart, "for there isn't another spring like it in Canada, as far as I know, and I've searched high and low."

"It certainly looks bad."

"The day that Brown went out to Harper's cabin and came back with the word that Harper'd sold out he looked as if he was coming back from his own funeral."

"And then you said you wouldn't lay down, and kept on fighting, judging from your record at the old city High," declared Evans.

"Yes, and I had better luck than I ever hoped for," was the reply, "as in less than two weeks I stepped across the international boundary into the United States and located an exact duplicate of the Harper spring, and better still, I was able to buy it at a price that made the water cost me less than we'd been paying old Harper."

"What's wrong, then—has the American spring dried up?"

"Haven't you followed up the tariff debates in Parliament? Didn't I tell you about Brown coming into the office one morning with the report of the new tariff?"

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"Yes, but you didn't say what part took the scare out of him."

"I guess I must have forgotten that part of it," Hart explained, "but Benson is some shakes politically, and he had pull enough with the party in power to have a big duty placed on mineral water coming into Canada which had formerly been on the free list. Benson saw to it that the new duty was just high enough so that if by the time we pay the duty it would make our manufactured product cost more than Benson can sell for at a fair profit. It's just put Brown right on the hammer financially, and I don't know where we're going to come out."

"Neither does the Regal Bank," said Evans.

"I haven't forgotten that your bank's been backing Brown and that you'll be stung if he goes to the wall, and if you can evolve some scheme to beat Benson at his own game you'll be saving my life and your own money at the same time," declared Hart.

"I'm prepared to do anything on earth that I can," agreed Evans, "and I don't mind telling you that we've been considering the Brown account pretty seriously and they've decided to leave it to me to see if it could be worked out in any way."

"Then you've got a perfectly free hand, and go to it," urged Hart.

"And I don't mind telling you, too, that all these shrewd stunts that I've got the credit of pulling off are really the work of Pete Logan, a legal friend of mine and the attorney for the Regal Bank," Evans explained.

"Could we see this man Logan for a half hour chat?" demanded Hart.

Evans put on his overcoat and hat.

"Come on down to his office right now," he suggested.

Half an hour later Hart had explained the situation to the attorney.

"Now, I know we're right up against it," he

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admitted, "and the grand question is, can you pull us out of the hole?"

"And the Regal Bank at the same time," smiled Logan.

"Sure," agreed Hart. "The day we've overcome this obstacle we can get all the private financing we want, so if you can put it over Benson and beat him at his own game the Regal account'll be closed out inside of twenty-four hours."

Logan walked across to the office window and stood gazing moodily at the building across the courtyard. A thin sheet of ice covered the roof, and the sun, striking fair upon it, turned it into a flashing sheet of molten silver. He whirled suddenly, shot across the office, and jerked a bulky volume from the bookcase.

"I suppose you are familiar with the Canadian tariff?" he flung over his shoulder, rapidly running over the pages at the same time.

"I ought to be by this time," admitted Hart.

Logan evidently found what he was looking for, and replaced the book in the case.

"How much of that American mineral water do you use in the run of a year?" he snapped.

"How much did we use in the past is the proper way to put it," was the gloomy reply.

"Well, never mind the tense—how many gallons, say?"

"It isn't a question of quantity as much as quality," said Hart, "and 12,000 gallons a year would supply our needs till we are ready to retire."

Logan lit a new cigar, and passed the box to Hart.

"And you can see no way of getting that water through the tariff wall and save the duty?" he queried.

"I might bring it over the top of the wall by a flying machine or underneath by a pipe line, but the transportation charges would be prohibitive."

"It's just as easy as rolling off a log."

"If you can see a hole through the tariff wall, tell me quick," urged Hart.

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"Benson isn't as far sighted as he thinks he is," laughed Logan, "for I just looked up the Canadian tariff and there's no duty on ice coming into Canada. More than that, the 'ice trust' has too big a pull for Benson to get it off the free list."

"Then your idea is —"

"Simple enough," declared Logan. "Just freeze up your mineral water in the United States and bring it in as ice. I don't imagine the expense of freezing and thawing would amount to very much."

"Holy Napoleon," gasped Hart, "that beats any stunt you've pulled off yet."

"Just pure luck again," laughed Evans.

"Fling me over a telegraph blank," exclaimed Hart.

"Here you are."

"I must wire Brown that we're out of the wolf's jaws. Yes, give me two blanks. Brown'll get his at the office and I want Maisie to get the good news just as soon as he does."

"Thoughtful boy," laughed Evans.

"Sure I am," agreed Hart, "and while I'm about it I'll tell Brown to get money enough to pay off your claim the first crack out of the box and send it down here."

"Good idea."

"And what's your bill?"

Logan lit a new cigar.

"The Regal Bank pays the bills as I understand it —"

"And delighted to," interrupted Evans.

"But, if you don't mind," smiled Logan, "you might send Evans and I engraved invitations to that wedding that he hinted at."

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NOTABLE CASES NOTATED.

Bankruptcy of Incorporated Company—Retention of Entity after Discharge.

It has often been mooted, since the Bankruptcy Act came into operation, what the effect of either an Assignment or of an actual adjudication is upon the entity of the Corporation itself. Bankruptcy is not a dissolution or a winding up. It is an adjustment of liabilities—a liquidation of liabilities by the realized assets of the Bankrupt. It is the same whether the Bankrupt is an individual or a Corporation. The Bankruptcy Act deals with Debtors, and a Debtor, by definition of the Act itself, includes a Corporate Company. After the Bankruptcy, the individual debtor may get his discharge and be restored to his full contractual status; and why not the Corporation—the Corporate Entity which for all purposes of Bankruptcy is an individual person? There is no reason.

The case of *Canadian Cereal and Flour Mills Company, Limited*,[17] comes to our aid in this problem.

Mr. Justice Orde, in that case, said the Bankruptcy Act contains no provisions corresponding to those in the Dominion Winding-up Act which, in effect, deprive the Shareholders and Directors of any further power in administering the Company's affairs. But under the Bankruptcy Act except in those cases where the proceedings are continued under the Winding-up Act by virtue of Bankruptcy Rule 13 (*vide* sub-sec. 2 of sec. 66 of the Act) a company which makes an assignment is to all intents and purposes in no different position from a natural person. There is nothing in the Act which destroys its corporate entity or interferes with its power to "function" as a Corporation. It would, doubtless, be entitled to a discharge in a proper case. Then he pointed out that it is always open to a Bankrupt or a party having made an Assign-

[17] 67 D. L. R., p. 234.

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ment to effect a Composition; and there is nothing to prevent the Corporation or its Directors or Shareholders from this means of adjusting its liabilities with the Creditors of the Company. For making the adjustment the Shareholders and Directors have the same powers as any other debtor may have; and within the compass of their powers the officers on behalf of the Company may effect an arrangement or composition.

He says as the corporate entity of the Company continues notwithstanding the Bankruptcy, the Directors might subject themselves to the penalties of the Companies Act for non-compliance with its provisions; but that "if the Directors and Shareholders desire to keep the Company alive, then it would seem to be incumbent on them to comply with the Companies Act in regard to the payment of fees and other matters."

This reads good Law; and will doubtless be a standing authority on this hitherto somewhat obscure problem.

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OUR LONDON LETTER.

By Frank Gahan, M.A., LL.B., B.C.L., of the Inner Temple, Barrister-at-Law.

The dramatic change of government and the General Election absorb the public attention at the moment. An even larger number of barristers than usual are candidates for election, and the Court has been listening, not unsympathetically, to a steady stream of applications to postpone cases until after the polls.

From the standpoint of constitutional law, the crisis is of great interest and of no small importance. The Conservative revolt against the Coalition was primarily a revolt against one-man power. Mr. Lloyd George is admitted by all but the most bigoted partisans to have been incomparable as a war leader. The outcome of the war would undoubtedly have been jeopardized had he not directly asserted his dynamic personality in the various spheres of foreign, imperial and domestic policy, of military organization and industrial co-operation, which had to be brought into harmony if their combined effect was to vanquish the enemy. To exert his full power Mr. Lloyd George throughout the war years steadily developed a system of presidential government. His place in the House of Commons was taken by a Leader. The collective responsibility of the Cabinet became a myth. Through the Cabinet secretariat the Prime Minister's office was organized into a Government department. All business with the League of Nations was there transacted, and Mr. Lloyd George also took many other questions of policy into his own hands.

Probably this new conception of the duties of the Prime Minister would have become embedded in the

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English Constitution if Mr. Lloyd George's followers had been for the most part Liberals. He was, however, dependent for support on the Conservatives, who in fact had a clear majority in the House of Commons. The Conservative rank and file throughout the country have for well over a year been growing more and more restive that their policy should be controlled by Mr. Lloyd George, who, at any rate in foreign policies, did not represent Conservative feeling. The storm gathered and finally burst at the Carlton Club. The Turkish crisis, in which the Foreign Secretary pulled the country out of a disastrous situation into which the Prime Minister's intermeddling with the proper work of the Foreign Office had plunged it, brought the discontent to a head and precipitated the rush back to the pre-war conception of the Prime Minister's duties. The result is a Government which has promptly set to work to restore the Constitutional position which Mr. Lloyd George found. Already the Cabinet secretariat is swept away, the machinery of the League of Nations has been transferred to the Foreign Office, the heads of departments will be freed from interference by the Prime Minister, and the collective responsibility of the Cabinet will be restored. The Prime Minister will again be merely *primus inter pares*. Probably the reaction will be strong and the Cabinet will shrink in size. For it is clear that the unwieldy size of twentieth century Cabinets was one of the chief causes for the decay of the collective responsibility. The crisis, in so far as it concerns the Constitutional lawyer, is a healthy and encouraging sign.

Ousting the Government.

The manner in which Mr. Lloyd George's Government fell is unique. The old rule of Constitutional practice was for a Ministry to resign only when defeated in the House of Commons. Thus it will be

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remembered that in 1892, when Lord Salisbury's Government met with an overwhelming defeat at the polls, it yet retained office until the House of Commons met. The Constitutional position of the Crown in such a situation is difficult, however. It will be remembered that when Sir Charles Tupper was beaten in the General Election of 1896, he recommended appointments to the Bench and Senate on which the Governor-General refused to act. Later, in the House of Commons Sir Charles attacked this attitude of the Crown, but Sir Wilfrid Laurier sturdily defended it. Disraeli and Gladstone set the example, now always followed both in the United Kingdom and in the Dominions, of resigning immediately upon defeat in a General Election. Conventions of the Constitution, as Dicey shows, find their sanction in the inevitable clash with the law which would result from their breach, if persisted in. That a Ministry unable to control the House of Commons must resign, is a well settled convention. The practice of resigning upon an electoral defeat is due to the knowledge that this convention would operate as soon as Parliament assembled. The same deduction had to be made from the defeat of the Conservative leaders in the Carlton Club meeting. At first sight it is startling that a partisan meeting should cause the downfall of a Government; but the reason was simply that, like an adverse General Election, the result showed that when Parliament reassembled the Government would not have a majority in the House. Hence, its only course was to resign or to advise the King to dissolve Parliament. The "Tory revolt" was due to the strong feeling of the Conservative rank and file, and the incident graphically illustrates the power of the "political sovereign," even apart from an election. Unless, however, Mr. Lloyd George realized that the Carlton Club meeting truly represented electoral opinion, it is difficult to see why, rather than resign, he did not recommend a dissolution.

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Dyarchy in India.

Other interesting aspects of the change concern Ireland and India. Whatever the result of the Election, Ireland is assured of her Dominion constitution, and India will have the whole-hearted assistance of the British Government in her political development under the Montagu Act. That Act, for which India is indebted to Lord Meston, seeks to make the transition to responsible government in India a gradual and educative process. The Indian Civil Service wished to work by gradually increasing the number of natives in the Service. Lord Meston, however, fortunately convinced the Government of the unwisdom of that course. For in a body of, say, 35, the whole power would rest with the English as long as there were 18 of them. The natives would have no training in responsibility. Yet, when the number of English was changed to 17, the natives would be instantly supreme. The result would be disaster. The Montagu Act, therefore, sets up a dyarchy, under which different phases of government, of increasing degrees of importance, will successively, during a long period, be transferred to native control. Thus the natives will try their 'prentice hand on less important spheres of government, and, from their successes and failures in those spheres, train themselves for the efficient administration of more important functions of government. Meanwhile interest in government can be developed in the mass of the Indian population, which at present lamentably lacks a political sense. The conception is brilliant. Unfortunately, in practice it may suffer disastrously from the great reluctance now shown to enter the Indian Civil Service. The able type of man who hitherto has welcomed a post in the Indian Government, is now seeking a career in England. The Tory reactionaries, moreover, are still opposed to the principle underlying the Montagu reforms. If the project collapsed, it would indeed be a misfortune for the Empire. Consequently, Mr.

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Bonar Law's clear declaration that he will accept and work the Act, is doubly welcome.

Legal Appointments.

The legal appointments in the new Government were in all cases expected. Viscount Cave, if not so brilliant as his immediate predecessor on the woolsack, is a sound lawyer with an eminently judicial mind. He possesses the dignity befitting the highest legal office in the land, and a tact which will make him an ideal Speaker of the House of Lords. Mr. Douglas Hogg, now entering Parliament for the first time, has had a professional career which ensures that he will be as distinguished an Attorney-General as this century has yet seen. Mr. Inskip's party services and membership of the House of Commons made his appointment as Solicitor-General obvious. He has a sound practice, especially in commercial cases, but his reputation as a great lawyer is yet to be made.

Birkenhead Hits Out.

Lord Birkenhead, who made a very indifferent Attorney-General, has had an exceedingly brilliant career as Lord Chancellor. He has, however, promptly reverted to his old-time career of "Galloper Smith," and with an unbridled and partisan tongue is making clever but bitter speeches throughout the country. Friends and enemies alike are finding that the old "F. E." was merely disguised, not extinguished, under the Lord Chancellor's robes. At bar his impudence was always one of his greatest assets, and stories of it abound. A typical one records how a judge tried to hurry his conduct of a case by suggesting that there were a large number of other cases to be heard. "No doubt—but none of them interest my client." The Council of the Law Society has thanked him for the consideration which he consistently gave to the views of the solicitors throughout his tenure of office. Apart from this professional recognition, Lord Birkenhead is finding, as in my last letter I ventured to prophesy would be the case, that

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his great achievements in law reform are availing his party nothing in the electoral campaign. He must rank in history as one of the great Lord Chancellors, but probably the public is right in thinking that his ill-advised attempt to rush the Empire into another war, leaves his account in office with a debit balance.

Solicitors' Education.

The Law Society is developing a thorough system of education for clerks articled to solicitors. Under this year's Solicitors Act the Society has a largely increased revenue which is to be applied to the advancement of legal education. The Act provides that every clerk must, for at least one year, attend a school of law approved by the Society. In London the Society has its own school, but is now concerning itself with the needs of countless clerks scattered throughout the country. In large centres educational institutions already in existence will probably be induced to undertake the teaching of law if they are not already doing so. There will still, however, be many places where the expense of starting a law school would not be justified, but where the clerks cannot without the greatest inconvenience attend an established school. Probably the solution will be found by developing a system of extramural teaching.

Recent Cases.

No cases of outstanding importance have so far been heard this term. In a letter largely concerned with Constitutional law, mention may be made of one case affecting the position of the soldier. The case was a test case, the result of which decided a number of pending cases. Canadian troops stationed at Witley in February, 1919, were naturally impatient at the failure to demobilise them promptly. The discontent grew, until at last it broke out in a riot. A mob of soldiers wrecked and plundered several temporary shops in the camp. The claim was by the shop-owners against the Surrey County Council as the police authority of the district. The camp was

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under military control, and it would have been physically impossible for the police to stop the disturbance. Mr. Justice Swift held that soldiers were not excused from the ordinary liabilities of the law relating to ordinary citizens. They, like civilians, might be guilty of riot and liable to answer not only to the military, but to the civil law. Accordingly he found for the plaintiff under the Riot (Damages) Act, 1886. One of the defences raised was that the plaintiff had provoked the troops by charging exorbitant prices. His lordship found as a fact, however, that there was no profiteering. Perhaps those of your readers who were quartered at Witley Camp may think that, if their evidence had been available, his lordship might have come to a different conclusion.

3 Dr. Johnson's Buildings,
Temple, London, E.C. 4.

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PUBLISHERS' ANNOUNCEMENT.

With this issue the CANADIAN LAW TIMES will cease publication, an arrangement having been made whereby it and the *Canadian Law Journal* become merged into a new magazine known as the *Canadian Bar Review.*

The *Canadian Bar Review* is the official organ of the Canadian Bar Association and has all the prestige of that influential organization behind it. It is peculiarly the property of the members of the Association, and upon the extent of their co-operation depends the measure of its success. We bespeak for the new magazine the added support of those of our old subscribers who are not already members of the Canadian Bar Association, and suggest that they send their applications for membership to the Secretary without delay. By so doing they will receive a special subscription rate.

By agreement with the Canadian Bar Association, we are publishing the *Canadian Bar Review* for them, and it will be regularly mailed to all subscribers from this office. No effort is being spared by the Editorial Board to make it an attractive and helpful magazine to all members of the profession. We hope to see it reach every office.

We thank our old subscribers to the LAW TIMES for their long continued patronage and many expressions of regret at its passing. We feel, however, that the best results, both to the publisher and subscriber generally, can be obtained by the publication of a single magazine, directly controlled by the Bar Association, as representative of the legal profession throughout Canada.

We unhesitatingly commend the *Canadian Bar Review* to all our readers.

THE CARSWELL COMPANY, LIMITED.

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